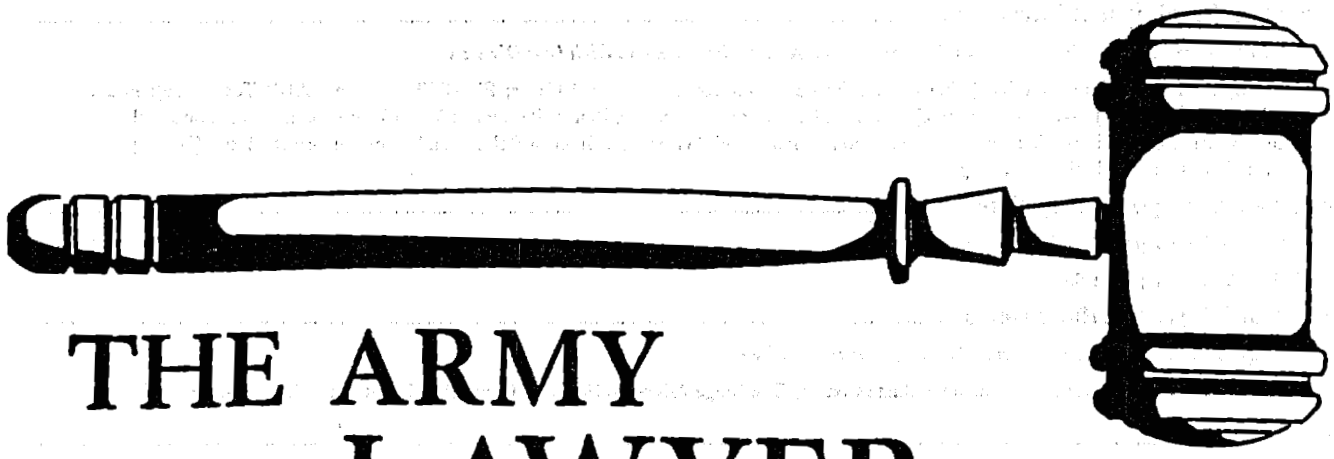

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-237

August 1992

Table of Contents

The Army Lawyer (ISSN 0364-1287)

Editor

Captain Benjamin T. Kash

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, JULY 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Address changes: Reserve Unit Members: Provide changes to your unit for SIDPERS-USAR entry. ***IRR, IMA, or AGR:*** Provide changes to personnel manager at ARPERCEN. ***National Guard and Active Duty:*** Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

The Road to Hell Is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence

Major Deana M.C. Willis
Chief, Criminal Law Division
Office of the Staff Judge Advocate
82d Airborne Division, Fort Bragg, North Carolina

Introduction

Although inappropriate attempts to influence the criminal justice process are problematical whenever they take place, they present special difficulties within the military criminal legal system. Because commanders not only have the responsibility of military command, but also are charged with the administration of military justice, a certain degree of "command control" is necessary and proper. Nevertheless, when commanders overstep their lawful prerogatives, improper "command influence"[1] results.

Unlawful command influence—direct and indirect, real and perceived—is one of the most persistent problems in military law.[2] Command influence concerns have arisen in a variety of situations: attempts by commanders to achieve certain results for specific classes of offenders,[3] efforts by staff officers to "stack" court-martial panels with persons thought to be disciplinarians,[4] actions that tended to "chill" the testimony of witnesses,[5] and efforts by supervisory judges to avoid complaints of light sentences.[6] Unlawful command influence surfaces with each generation of junior leaders because senior commissioned and noncommissioned officers fail adequately to teach these new leaders the lessons learned from mistakes made in the past.

The term "command influence" is a misnomer. The perpetrators can be staff officers,[7] judges,[8] and noncommissioned officers (NCOs),[9] as well as commanders.[10] While not all "command control" is impermissible,[11] almost any "external" influence on the judicial process can constitute unlawful command influence. Case law also shows that impermissible influence can be "internal," occurring, for example, when a senior court-martial member uses his or her rank to influence

---

[1] "Command influence is the improper use, or perception of use, of superior authority to interfere with the court-martial process. It may consist of interference with the disposition of charges, with judicial independence, with the obtaining or presentation of evidence, or with the independence and neutrality of court members." *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 18-28.00 (1991); *see also* UCMJ art. 37 (1988).

[2] The question of command control was a vital element in military justice reform. *See Uniform Code of Military Justice, 1950: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 626 (1949). Cases dealing with unlawful command influence span the reported history—many mistakes, such as giving inappropriate speeches or printing articles subject to controversy, have recurred over time. *See* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); United States v. Brice, 19 M.J. 170 (C.M.A. 1985); United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974); United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1953); United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990); United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1987); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *rev'd*, 25 M.J. 326 (C.M.A. 1987); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984). The appellate courts use the terms "unlawful command control," "unlawful command influence," and "command influence" interchangeably.

[3] *E.g.*, *Howard*, 48 C.M.R. at 939 (commanding general targeted "drug peddlers" in a written publication, indicating that he would grant no clemency to convicted drug dealers).

[4] *Hilow*, 32 M.J. at 439.

[5] *E.g.*, United States v. Jones, 30 M.J. 849 (N.M.C.M.R. 1990); United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984).

[6] *E.g.*, United States v. Mabe, 30 M.J. 1254 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 232 (C.M.A. 1991); *see also* United States v. Allen, 33 M.J. 209, 211 (C.M.A. 1991).

[7] *Hilow*, 32 M.J. at 439 (division deputy adjutant general); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986) (staff judge advocate).

[8] *See Allen*, 33 M.J. at 211; *Mabe*, 30 M.J. at 1254; United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1987).

[9] United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988); United States v. Levite, 25 M.J. 334 (C.M.A. 1987); United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984).

[10] *E.g.*, United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984); United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982).

[11] *See, e.g.*, United States v. Rivera, 45 C.M.R. 582, 584 (A.C.M.R. 1972). In *Rivera*, the Army court stated:

> The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he [or she] may give consideration to the policies and wishes of his [or her] superior, fully understands and believes that he [or she] has a realistic choice to accept or reject them. If all viable alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion legitimately placed with the subordinate commander.

Id.

junior members.[12] Whatever the source of the problem, the command must initiate thorough, immediate remedial measures as soon as unlawful command influence is identified.

The inevitable friction between a commander's interests in maintaining good order and discipline and an accused's right to a fair trial ensures that unlawful command influence will continue to be a problem.[13] The Court of Military Appeals has remarked that the process of maintaining discipline without denying fairness in military justice requires "a delicate balance" in an area filled with perils for the unwary.[14] This tension between discipline and fairness is not new—commanders have been aware of it for decades. General William C. Westmoreland, for example, acknowledged that tension in 1971, stating that "[a] military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and fulfilling this function, it will promote discipline."[15]

This article focuses on improper, affirmative command actions taken for the otherwise legitimate purposes of preserving and enhancing discipline and morale. In these actions, commissioned and noncommissioned officers intentionally or unintentionally influenced the outcomes of military justice proceedings.[16]

Sensitivity to the presence of unlawful command influence is especially important to judge advocates serving as trial counsel, defense counsel, judges, or staff judge advocates (SJAs). The Judge Advocate General and the appellate courts require judge advocates to act aggressively to correct unlawful command influence. They are highly critical when judge advocates fail to recognize and correct this problem promptly.[17] Congress also has recognized this issue, pointedly highlighting it in a 1991 Senate investigatory report that was triggered in part by the unlawful command influence allegations arising in the United States Army, Europe, in the early 1980's.[18] This report censured the leadership of the Judge Advocate General's Corps for failing to ensure a thorough investigation of a command influence problem in the 3d Armored Division. The Senate report concluded that "[a]s a result [of this laxity], no one was held accountable or responsible for the chain of events which . . . undermined the administration of justice in the . . . Division."[19]

Actual Unlawful Command Influence Versus the Appearance of Unlawful Command Influence

Problems for judge advocates may arise from *actual* unlawful command influence or from the *appearance* of unlawful command influence.[20] From a practical standpoint, actual unlawful command influence, once identified, is the easier of the two to handle.[21] Actual unlawful command influence occurs when an actor in an accused's chain of command improp-

---

[12] *See* United States v. Accordino, 20 M.J. 102 (C.M.A. 1985).

[13] Tension can arise from the command's desire to preserve "good order and discipline" through deterrence—that is, a commander may feel compelled to punish a particular offender to "send the message" to other members of the command that the accused's misconduct is intolerable. This aim conflicts with the judicial responsibility to ensure that the accused receives a fair trial, regardless of the impact of the outcome on other soldiers. Another source of friction is the perception of fairness within the military. A verdict that is perceived within the command to be unfair tends to degrade morale and breed discipline problems.

[14] United States v. Treakle, 18 M.J. 646, 653 (A.C.M.R. 1984) (quoting United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953)).

[15] *See* William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 18, 22 (1971).

[16] This article does not address the relatively new category of cases dealing with "command influence" exercised by supervising military lawyers or judges.

[17] "Although the commander is ultimately responsible [for command policy], both [the commander and the] staff judge advocate have a duty to ensure that directives in the area of military justice are accurately stated, clearly understood, and properly executed." *Treakle*, 18 M.J. at 653-54; *see also* United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986) (the "legal advisor [either] failed to perceive that a problem was developing from [the commanding general's] stated policies or . . . was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice"); United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1987).

[18] S. REP. No. 1, 102d Cong., 1st Sess. 4-15 (1991).

[19] *Id.* at 12.

[20] In *United States v. Cruz*, the Army Court of Military Review stated,

> Command influence law addresses two different questions which must be considered from two different points of view. The first question is whether the accused was prejudiced by *actual* unlawful command influence. The second question is whether there will exist in the minds of the public the *appearance* that he was.
>
> . . . .
>
> . . . . [T]he issue of actual unlawful command influence must be considered from inside the military justice system. . . . On the other hand, the appearance that an appellant has been prejudiced by unlawful command influence must be considered from outside the military justice system . . . .

United States v. Cruz, 20 M.J. 873, 882 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

[21] Trial defense counsel are in a unique position to identify incidents of actual unlawful command influence. Prospective witnesses often candidly admit to defense counsel that they are being pressured to conform their testimonies to the "official" account of an offense. Defense counsel, however, sometimes are not informed directly. Intimidated witnesses may appear to "forget" key details, modify their stories, lose their initial enthusiasm, or find reasons to be absent during trials. Exercise of unlawful command influence is very subtle—only rarely is it expressed directly, even to the person who is influenced.

erly influences a case adversely to the accused.[22] The unlawful command influence is intentional if the actor meant to affect the military justice process and the actual fairness of a trial.[23] When this occurs, a common remedy is to remove the perpetrator from the position from which he or she wielded the unlawful influence and to issue corrective instructions to the people influenced.[24]

The Navy-Marine Corps Court of Military Review recently recognized that actual unlawful command influence also may arise unintentionally.[25] Examining the actual impact of unlawful command influence, the court held that the accused and the military justice system are no less victimized when the source of the unlawful influence did not intend to effect the ensuing adverse consequences. The Navy-Marine Corps court considered this interpretation beneficial to the adjudication of unlawful command influence issues for four reasons. First, no scientific means exist to determine a person's true motive or intent. Second, people have complex personalities and normally act out of mixed motives. Third, most cases are staffed through several levels; individuals at different levels rarely share common motives or intents. Finally, this approach permits the courts to adjudicate allegations of unlawful command influence without "stigmatizing the perpetrators as military justice outlaws."[26]

Whenever unlawful command influence arises, it taints the case and triggers the need for remedial measures. If a court recognizes that actual unlawful command influence is at issue in a case, the court also must consider whether the appearance of unlawful command influence exists and, if so, what remedial action is required.[27] The mere appearance of unlawful command influence may not affect the actual fairness of a trial, but it does erode public confidence in the military justice system.[28] Authorities have a harder time recognizing and correcting the appearance of unlawful command influence, a task made even more difficult because the intent underlying the offending action usually stems from a good motive, such as a desire to discourage drug trafficking.[29]

Even when they stem from good intentions, actions that create an appearance of unlawful command influence can cause substantial problems for the command and the military judiciary. For example, an allegation of unlawful command influence may cost a commander his or her power to serve as a convening authority.[30] Judges now must take whatever measures are necessary and appropriate to ensure, beyond a reasonable doubt, that the findings and sentences of courts-martial are unaffected by unlawful command influences.[31]

United States v. Toon[32] illustrates a situation in which a commander's prerogative to determine and promulgate policies ran afoul of the military justice system. The commanding general of the 82d Airborne Division published a command letter in the November 1972 issue of *Impact*, a division publication. In this letter, the general warned that he would grant

---

[22] In theory, a superior could exert unlawful command influence that is favorable to an accused. Not surprisingly, no reported decisions address this possibility. When command influence unfairly benefits an accused, he or she suffers no prejudice and—presumably—does not raise this issue on appeal.

[23] *See* United States v. Mabe, 33 M.J. 232, 239 (C.M.A. 1991) (citing United States v. Thomas, 22 M.J. 388 (C.M.A. 1986)); *see also Cruz*, 20 M.J. at 884.

[24] *See, e.g.*, United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988) (commander transferred a first sergeant after he suggested at an NCO call that defense witnesses might anticipate career setbacks, thereby eliminating his access to the rating process); *see also* United States v. Mabe, 30 M.J. 1254 (N.M.C.M.R. 1990) (senior judge removed from rating chain and rated officer instructed to disregard a letter from the former rater urging harder sentences at courts-martial), *aff'd*, 33 M.J. 232 (C.M.A. 1991).

[25] *See* United States v. Jameson, 33 M.J. 669 (N.M.C.M.R. 1991).

[26] *Id.* at 673.

[27] *See* United States v. Rosser, 6 M.J. 267, 271-72 (C.M.A. 1979).

[28] *See* United States v. Cruz, 20 M.J. 873, 884 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987). The Army Court of Military Review remarked,

> The law and the courts concern themselves with the appearance of unlawful command influence . . . not because an accused has any legitimate claim to relief where he has in fact suffered no prejudice but only appears to have. It is the interests of the military justice system itself which the appearance doctrine was designed to protect, since it is the military justice system itself which is harmed by the loss of public confidence.

Id.

[29] *See, e.g.*, United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974); United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990).

[30] The commanding general of Fort Drum lost the right to act as convening authority in cases involving illicit drugs after the publication of his editorial in the *Fort Drum Sentinel*. Interview with Major Sandra Stockel, Administrative Law Division, Office of The Judge Advocate General (Mar. 10, 1992). Major Stockel was Chief of Administrative Law, Office of the Staff Judge Advocate, Fort Drum, N.Y., when this incident occurred.

The commanding general of the 3d Armored Division lost the right to act as a convening authority in *any* case arising out of his command. Cases involving 3d Armored Division soldiers were routed routinely to the commanding general of VII Corps. Interview with Lieutenant Colonel Wendell Jewell, Chief, Military Personnel Branch, Litigation Division, U.S. Army Litigation Center, Arlington, VA (Mar. 5, 1992). Lieutenant Colonel Jewell served as military judge in most of the unlawful command influence cases from the 3d Armored Division.

[31] *See* United States v. Jones, 30 M.J. 849, 850 (N.M.C.M.R. 1990).

[32] 48 C.M.R. 139 (A.C.M.R. 1973).

no clemency to convicted drug dealers in his posttrial reviews. He added that "drug peddlers" would go to the Disciplinary Barracks at Fort Leavenworth for the full terms of their sentences and that all punitive discharges would stand.[33]

The Army Court of Military Review recognized the "clearly laudable objective of the commander" to reduce drug traffic in his unit.[34] Nevertheless, it characterized his aggressive use of the judicial process to eliminate drug traffickers from the Army as an impermissible injection of command policies into judicial proceedings.[35] *Toon* actually was an "appearance" case because, contrary to his assertions in *Impact*, the commanding general actually had agreed to a sentence limitation in the instant case and had restored Toon to duty after Toon completed a period of posttrial confinement.[36]

Unfortunately, history repeats itself. The Army court addressed a more recent example of good intentions gone awry in *United States v. Cortes*.[37] In *Cortes*, the appellate court scrutinized an article written by the commanding general of the 10th Mountain Division that appeared in the *Fort Drum Sentinel*. In this article, the general decried the presence of drug dealers on Fort Drum, describing them as "a slime that lives among us . . . a filth that is unspeakably sordid . . . a filth that should be flushed to a bottomless abyss where it will rot in its own stench forever."[38] The general concluded, "These criminals have no place in a free society . . . and should be removed from it."[39]

This strongly worded editorial gave rise to a claim of unlawful command influence.[40] Although this was not apparent from the record, the commanding general had directed his article not toward military personnel, but toward civilian drug traffickers who had been targeting school children in the commissary parking lot by handing out free drugs.[41] Nevertheless, the general's failure to identify the actual subjects of his editorial gave validity to the accused's allegations of unlawful command influence, and the Army court properly concluded that remedial measures were required.[42]

Problematic Command Actions

Written Policy Statements

Any review of published cases dealing with allegations of unlawful command influence quickly reveals certain scenarios that repeatedly trigger complaints. The most prevalent situation involves the publication of a letter, article, policy statement, or memorandum that specifically castigates a certain class of offenders (usually drug dealers), or discourages favorable testimony on behalf of convicted soldiers.[43]

The authors of these denunciations often are convening authorities, as was the case in *Cortes* and *Toon*; however, on

---

[33] *Id.* at 139; *see also* United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974).

[34] *Toon*, 48 C.M.R. at 142.

[35] *Id.* The appellate court believed that knowledge of the commander's announcement would induce court members to impose punitive discharges on soldiers convicted of selling drugs. *See id.* at 143.

[36] *See id.* The editorial also may have created the impression that the commanding general had an inflexible attitude toward clemency requests.

[37] 29 M.J. 946 (A.C.M.R. 1990). *Cortes* is an "appearance" case because the accused was tried and convicted on 15 February 1989, one month before the commanding general's editorial appeared in the *Fort Drum Sentinel*. An acting convening authority took final action on Cortes' case.

[38] *Id.* at 949 n.3.

[39] *Id.*

[40] The court ultimately found no basis for the claim. *Id.* at 949-50. The court noted that an acting convening authority, not the commanding general, took final action in the accused's case. It emphasized that the acting convening authority appended to the record of trial an affidavit in which he stated the basis for his action and declared that the commanding general's editorial did not affect his decision. *See id.* at 950; *cf.* United States v. Glidewell, 19 M.J. 797, 800 (A.C.M.R. 1985) (transfer of convening authority's posttrial review responsibilities to a subordinate failed to dissipate the taint of unlawful command influence when *no* evidence indicated whether the subordinate was disqualified from reviewing the case), *aff'd*, 23 M.J. 153 (C.M.A. 1986) (summary disposition).

[41] Interview with Major Sandra Stockel, *supra* note 30.

[42] On 14 April 1989, the commanding general issued a memorandum to clarify his comments and to emphasize that he did not intend to infringe any soldier's legal rights under the Uniform Code of Military Justice (UCMJ). *Id.* He also solicited honest recommendations from subordinates regarding appropriate disposition of individual cases. *Id.* Even so, the Army Court of Military Review expressed concerns about the impact of the published article and the general's ability to act impartially as a convening authority in courts-martial involving illicit drugs. *See Cortes*, 29 M.J. at 950. Ultimately, the court reserved comment, stating that it would address "[t]hat issue . . . when and if it is brought before [it]." *Id.*

In cases involving the appearance of unlawful command influence, public perceptions are critical. Standing alone, the general's retraction letter arguably was insufficient to dispel the appearance of unlawful command influence. Significantly, the general did not retreat from his original position that drug dealers are criminals who have no place in a free society. Although the general acknowledged that a soldier accused of committing an offense deserves to be treated fairly, legally, and individually by those who administer the military justice system, he apparently limited his guidance to recommendations regarding disposition of specific cases. Moreover, he evidently failed to emphasize the duty of court members to decide cases only on evidence introduced at trial, without regard to any command policies. *See generally* United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974). Furthermore, the commanding general's memorandum was distributed to military personnel, but evidently was not published in the *Fort Drum Sentinel*.

[43] *See Cortes*, 29 M.J. at 949-50; *see also* United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987); United States v. Thomas, 22 M.J. 288 (C.M.A. 1986); United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956); United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1987); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

occasion, the writer may be an NCO.[44] Typically, an author will state emphatically that a particular activity or class of offenders is bad and should be removed from the vicinity of the command. These messages often are disseminated through civilian publications as well as through military channels, especially when they are drafted by general officers.[45]

Speeches and Lectures

Speeches closely parallel published statements in tending to condemn particular illicit activities or classes of offenders. They vary in formality from a general officer's special presentation to the officers of a specific command[46] to routine NCO development classes given by a first sergeant.[47]

The most widely publicized speech incident occurred in the 3d Armored Division in the early 1980's. Over a period of several months, the commanding general addressed both officer and enlisted subordinates on military justice issues, espousing a "consistency theory" in referral recommendations and trial testimony. The general stated that he

> found it paradoxical for a unit commander, who had recommended that an accused be tried by a court-martial authorized to adjudge a punitive discharge, to later appear as a defense character witness at the sentencing stage of the trial, testify as to the accused's good character, and recommend that the convicted soldier be retained in the service.[48]

This theory misstated the law[49] and was widely misunderstood.[50]

When challenged, the commanding general maintained that he wanted subordinate commanders carefully to consider recommending lower-level courts-martial if they did not believe that the accused should be discharged.[51] The general, however, failed to communicate this message consistently to his audience. Some subordinate commanders understood the message as the general intended.[52] At least one commander, however, understood the general to take a "dim view of a soldier's chain of command . . . offering testimony on the accused's behalf" during sentencing procedures.[53] Some soldiers understood the remarks to mean that favorable character testimony was discouraged in prefindings procedures as well as presentencing.[54] This situation was exacerbated by the publication of two documents, one written by the division command sergeant major and the other by a brigade command sergeant major. Both pieces asserted that NCOs should not testify that a service member convicted of a serious crime was a "good soldier."[55]

These command actions caused a furor, affecting several hundred soldiers directly and causing considerable delay and expense during appellate proceedings. A Senate investigator later characterized the division commander's remarks as "intemperate" and "overreaching."[56] In addressing the cases arising out of the 3d Armored Division, the Court of Military Appeals cautioned against a repeat of these events, warning

---

[44] The division command sergeant major and a brigade command sergeant major issued separate guidance to their subordinate NCOs to discourage testimony on behalf of soldiers convicted of serious offenses. *See* United States v. Treakle, 18 M.J. 646, 651 (A.C.M.R. 1984).

[45] *See, e.g., Cortes*, 29 M.J. at 949 n.3 (editorial published in the *Fort Drum Sentinel*); *Howard*, 48 C.M.R. at 939 (interview published in the *Impact* magazine at Fort Bragg). When the author is an NCO, the publication range tends to be narrower. Frequently, the author's comments are distributed only within an individual unit. *See, e.g., Treakle*, 18 M.J. at 651 (brigade command sergeant major drafted a disposition form stating that NCOs had a moral obligation not to recommend retention for soldiers convicted of various serious crimes, then distributed this form to brigade NCOs).

[46] *See, e.g.*, United States v. Brice, 19 M.J. 170 (C.M.A. 1985).

[47] *See, e.g.*, United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988).

[48] United States v. Thomas, 22 M.J. 388, 391-92 (C.M.A. 1986); *see also Treakle*, 18 M.J. at 650.

[49] The standard of proof for referring a case to trial—probable cause—differs from the standard of proof for conviction—proof beyond a reasonable doubt. Preferral and referral decisions are made early in the case. Postpreferral or postreferral investigation can reveal information not previously known when the command made its initial recommendations. This additional information can affect a commander's determination of an accused's rehabilitative potential or suitability for retention. Moreover, a commander's honest belief that a soldier committed an offense that should be punished as directed by a court-martial need not prevent the commander from testifying truthfully that the soldier was a "good soldier" who could continue to serve in the military.

[50] *See Treakle*, 18 M.J. at 650-51 (describing in detail the "widely different perceptions" of the commanding general's message).

[51] *Id.* at 650.

[52] *See generally id.* at 653 (the commanding general evidently "sought to correct a perceived problem— inconsistency between recommendations that a case be tried by a court capable of adjudging a discharge and testimony that the accused should be retained in service"). *See generally* S. REP. No. 1, *supra* note 18 (describing commanding general's stated intentions in detail).

[53] *Treakle*, 18 M.J. at 650; *see also* S. REP. No. 1, *supra* note 18, at 47 (notes of Lieutenant Colonel Bartholomew).

[54] *Treakle*, 18 M.J. at 650. *See generally* S. REP. No. 1, *supra* note 18, at 36-55.

[55] *See Treakle*, 18 M.J. at 651.

[56] S. REP. No. 1, *supra* note 18, at 12.

that it would consider drastic remedies to eliminate the taint of unlawful command influence in future cases.[57]

Timing is critical when dealing with speech-generated unlawful command influence. For example, in *United States v. Brice*,[58] the Commandant of the Marine Corps addressed the officers assigned to Marine Corps Combat Developments Center, Quantico, Virginia, including the court members of a trial in progress. Brice, the accused in that trial, was charged with use, transfer, and sale of LSD. Over the defense counsel's objection, the military judge granted a recess to permit the members to attend the Commandant's lecture.[59]

During his presentation, the Commandant stated that drug trafficking was "intolerable" in the military and that drug traffickers should be "out" of the Marine Corps.[60] When the court-martial reconvened, the military judge denied a defense motion for a mistrial. The Court of Military Appeals reversed Brice's conviction. The court emphasized that its decision was compelled not by the Commandant's remarks, but by "the peculiar timing of the . . . lecture."[61]

Object Lessons (Public Spectacles)

One of the riskier ways of expressing a command policy statement is the object lesson, or public spectacle. Object lessons include mass arrests during unit formations,[62] publicly stripping unit insignia from an accused's uniform, subjecting an accused to a ceremonial "drumming out," cloistering accused soldiers in special units, and disclosing the contents of an accused's service member information file (SMIF) to an assembled formation.[63] These exhibitions are especially egregious when the command accompanies them with rhetoric condemning the accused as a "criminal."[64] Although a public spectacle may be terribly dramatic and certainly will drive home the commander's point, it also may strip an accused of the presumption of innocence, leading observers to suspend their independent judgment about the individual's culpability and giving rise to allegations of unlawful command influence. Not surprisingly, the military appellate courts view these actions unfavorably.[65] Even when no actual unlawful command influence is present, such actions create an appearance of unlawful command influence that can be "so aggravated

---

[57] United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986).

[58] 19 M.J. 170 (C.M.A. 1985).

[59] *Id.* at 171. The commanding general at Quantico "had directed that all officers at the base would be at the base to hear the Commandant's address." *Id.* The trial counsel specifically advised the military judge that "the subject of the . . . address would be 'drugs and things like that'" and that the commanding general "had indicated that members of the court-martial would not be exempt from attending." *Id.* The military judge refused to interfere with the command directive. *Id.*

[60] *Id.*

[61] *Id.* at 172 & n.3. The court remarked,

> We do not in any way wish to be viewed as condemning the contents of the Commandant's remarks since the drug problem in the military demands command attention; nor do we feel that such remarks necessarily constitute illegal command influence. Instead, we base our decision on the confluence of subject and timing, particularly as they affect the minds—however subtly or imperceptibly—of the triers of fact in this particular case.

Id. at 172 n.3.

[62] Mass arrests are not illegal per se; however, the command must guard against stripping the arrestees of their presumptions of innocence or denouncing them as criminals. "Public accusations by a commander are permissible; public declarations of guilt are not." United States v. Cruz, 20 M.J. 873, 895 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

[63] *See* United States v. Levite, 25 M.J. 334 (C.M.A. 1987); *Cruz*, 20 M.J. at 873. *Cruz* is the best recorded example of the public spectacle. The record indicates that, when faced with a major drug problem within his unit, a division artillery (DIVARTY) commander effected a mass apprehension at a unit formation. *See Cruz*, 20 M.J. at 875.

Addressing approximately 1200 soldiers at the unit formation, the commander first spoke about leadership, discipline, and the need for readiness. *Id.* at 875-76. He stated that drug abuse and drug trafficking adversely affected command readiness and could not be tolerated. *Id.* at 876. He then announced that some of the soldiers at the formation failed to meet command or Army standards and should be removed from their units. *Id.* He either called these soldiers "criminals" or stated generally that criminals would not be tolerated in the command. *Id.*

While the commander was speaking, law enforcement personnel surrounded the parade field. The commander then called out the names of 40 soldiers and ordered them to report to the front of the formation. *Id.* The reporting soldiers were escorted by their superiors in the chain of command. *Id.* The soldiers' unit crests were removed before the soldiers reported to the commander. *Id.* When they reported to the commander, he declined to return their salutes. *Id.* (Military custom denies prisoners the courtesy of a return salute.) In full view of the assembled formation, the soldiers were searched, handcuffed, and marched to a waiting bus. *Id.*

Upon their return to the unit, the majority of the soldiers were billeted together. *Id.* at 877. The command ultimately formed them into a unit called the "Peyote Platoon" and allegedly forced them to march to the cadence of "peyote, peyote, peyote." *Id.*

[64] *Cruz*, 20 M.J. at 876.

[65] *Cruz*, 20 M.J. at 895 (Naughton, J. dissenting). Judge Naughton remarked,

> I find that [the DIVARTY commander's] actions, considered *in toto*, effectively stripped the appellant and thirty-nine other individuals of their presumption of innocence. . . . .
>
> . . . .
>
> . . . . When a commander . . . publicly and forcefully identifies a specific individual as being guilty of criminal offenses, a substantial risk arises that the subordinates who hear him will suspend their independent judgment about the individual's guilt or innocence.

Id.; *see also Levite*, 25 M.J. at 341.

and so ineradicable that no remedy short of reversal of the findings and sentence will convince the public that the accused has been fairly tried."[66] As the Army Court of Military Review stated in *Cruz*, "[t]he realities of military life regarding the relationships between superiors and subordinates create a concern that a subordinate in this situation will either embrace his superior's beliefs or at least not act contrary to those beliefs."[67]

Witness Tampering

Witness tampering is the most pernicious form of unlawful command influence. It commonly occurs in an "office visit" scenario or through the threat of reprisal. Prospective defense witnesses are the usual targets of these tactics. The "office visit" generally is characterized by an order from a superior to a subordinate to "report to my office." When the witness enters the superior's office, the superior informs the witness of a command policy, relates a series of anecdotes about adverse actions that befell other witnesses who testified in contravention of the command policy, and states or implies that the witness could prolong his or her career by changing his or her testimony.[68]

Appellate courts almost invariably characterize such incidents as actual unlawful command influence because they deny the accused the right to witnesses who can testify on the accused's behalf without fear of reprisal.[69] A glaring example of pervasive witness tampering within a unit may be found in *United States v. Levite*.[70] The efforts of Levite's chain of command to intimidate defense witnesses comprise a compendium of what commanders should *not* do, encompassing not only office visits, but also object lessons, intimidating speeches, and—possibly—reprisals.

Before Levite's trial began, Levite's battalion sergeant major called a unit meeting in which he disclosed information from the accused's SMIF that allegedly showed Levite's "bad character."[71] The sergeant major also speculated that the accused was involved in the pandering of two female privates in the unit who were not present at the meeting. He later called the two privates into his office, stated that he thought the accused was "pimping" them, and again disclosed information from the accused's SMIF. One of the privates later attended a meeting on an unrelated matter with two of her commanders. The company commander criticized her for associating with Levite and discussed his views of Levite's guilt, leaving the private with the impression the commander did not want her to testify as a defense witness.

A few days before trial, Levite's first sergeant learned that three NCOs were scheduled to testify as defense witnesses. The company commander directed the first sergeant to have the three NCOs report to the orderly room and to ask them to "review" the accused's SMIF "so that they would be current in their testimony."[72] The battalion commander and company commander also may have harassed an officer whom the defense counsel expected to testify about a Government witness's bad character for honesty. After her superiors counselled her "on another matter" shortly before the trial, this officer declined to testify on the accused's behalf.[73]

The chain of command attended the trial. After testifying himself, the company commander remained in the courtroom to observe the testimony of the three NCOs. One sergeant

---

[66] *Cruz*, 20 M.J. at 892. Significantly, however, the Army found no actual unlawful command influence present in *Cruz* and upheld the conviction, which was based on a guilty plea. *Id.* at 890; *accord Cruz*, 25 M.J. 326, 329 (C.M.A. 1987). "Reversal of findings or sentence is an unmerited windfall to an appellant who has not suffered actual prejudice, although it may be required as a last resort when no other feasible course of action will restore public confidence." *Cruz*, 20 M.J. at 890. The majority of the Army court found that sufficient information was available to the public in this case to dispel the appearance of unlawful command influence, despite the publicity surrounding the initial arrests. *Id.* at 891. *But cf. Cruz*, 25 M.J. at 329 (remarking that, although "the findings of guilty were not affected by the command action," the court had "grave doubts that the sentence hearing in this case was fair").

[67] *Cruz*, 20 M.J. at 895-96 (citing HOMER E. MOYER, JUSTICE AND THE MILITARY § 3-220 (1972)).

[68] *See, e.g.*, United States v. Levite, 25 M.J. 334 (C.M.A. 1987) (command sergeant major called two privates into his office to discuss their relationships with the accused); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986) (SJA called two officers who were scheduled as extenuation and mitigation witnesses into his office before they testified and informed them of the seriousness of the charges pending against the accused); United States v. Glidewell, 19 M.J. 797 (A.C.M.R. 1985) (division SJA allegedly attempted to discourage a former battalion commander from giving favorable character testimony in a case by communicating the division commander's displeasure with such testimony). In United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984), the appellant's battery commander called all defense witnesses into his office two days before trial, discussed the Army policy on drugs, and gave them a letter concerning drugs in the military. *Id.* at 764. On the day of trial, the same commander approached the defense witnesses in the waiting room, stated that he wanted the appellant to receive the maximum punishment, and directed them to read an extract from United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). Saunders, 19 M.J. at 764. In United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982), a wing commander learned that the accused's squadron commander believed that the accused should be retained on active duty. Calling the squadron commander into his office, the wing commander indicated that these views did not coincide with his own policy regarding personnel involved in drug offenses; alluded to a similar incident in which a squadron commander nearly was relieved for disposing of a drug case by nonjudicial punishment, rather than referring it to trial; and advised the squadron commander to modify his views. *Id.* at 509.

[69] *See Charles*, 15 M.J. at 510.

[70] 25 M.J. 334 (C.M.A. 1987).

[71] *Id.* at 335-36.

[72] *Id.* at 336.

[73] *Id.*

stated that the company commander and the first sergeant "'gave' him 'strange looks'" while he was testifying.[74] At some point, the first sergeant left the courtroom and allegedly "ranted and raved" in the hallway about NCOs who condoned drug use by their soldiers. A fourth NCO who had been expected to testify for the defense was inexplicably absent. When questioned later, he stated that he had experienced many problems with the company commander after testifying for the defense in an earlier court-martial.

The first sergeant held a unit formation the day after Levite's trial. Waving a dictionary, a *Manual for Courts-Martial*, and a copy of the enlistment oath, the first sergeant declared that "some people did not know what 'good' meant" and lectured the soldiers on the illegality of drug offenses.[75] After the formation, the company commander, the sergeant major, and the first sergeant individually counseled the three NCOs who had testified, informing them "that they had embarrassed the unit" and that their testimony had been "unprofessional."[76] One NCO later was accused of perjuring his testimony and was reduced one grade through nonjudicial punishment. A second NCO stated that "he would not be surprised if 'something negative' happened to him as a result" of his testimony.[77]

The tension escalated when the trial defense counsel requested an investigation to determine whether unlawful command influence had tainted the trial. A military judge conducted an investigation under Army Regulation (AR) 15-6.[78] Despite his requests, the defense counsel repeatedly was denied access to a complete copy of the investigation. Finally, the defense counsel asked that the entire AR 15-6 investigation be attached as part of the record of trial.[79] The SJA, who originally had advised the convening authority to approve the sentence as adjudged, then submitted an addendum in which he recommended that the period of confinement be halved "in an abundance of caution and to ensure that the accused's trial [was] totally free from even the appearance of unfairness."[80] The Army Court of Military Review affirmed the findings and sentence in a short-form opinion, indicating that it found no viable issues on appeal.

The Court of Military Appeals disagreed.[81] It remarked pointedly that the SJA "grudgingly recommended . . . [that the convening authority take remedial action] only after . . . [receiving a defense] request . . . to append the investigation officer's findings and recommendations to the record of trial."[82] The court found this "summary resolution of the prejudice question . . . completely unacceptable."[83] Declaring that the unlawful "command influence exercised in this case was as pervasive as it was pernicious,"[84] the court concluded,

> Every effort was made by the command to ensure that the court-martial convicted and punished [Levite] . . . in accord with its will. . . . Upon discovery of this fraud on the court, insufficient effort was expended to root out its cause and nullify its effect. We have no confidence . . . in this verdict and it must be overturned.

A subsequent decision, *United States v. Jones*,[85] illustrates unlawful command influence generated through posttestimony reprisals against defense witnesses. This invidious practice does not mar the fairness of the completed trial, but does affect future trials by chilling the testimony of potential witnesses.

The key to understanding *Jones* lies in knowing the fate of the defense witnesses in *United States v. Jameson*.[86] Both cases charged female drill instructors with engaging in homo-

---

[74] The Court of Military Appeals disapproved of this form of command intimidation, stating that forcing a witness to testify "under the glare of the commander and his minions" is a form of witness tampering. *Id.* at 340.

[75] *Id.* at 337.

[76] *Id.* at 336-37.

[77] *Id.* at 337.

[78] *See* Dep't of Army, Reg. 15-6, BOARDS, COMMISSIONS AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (24 Aug. 1977). Major Joseph A. Russelburg, a military judge who had not heard the case, was the investigating officer. The published opinion does not provide detailed information about Major Russelburg's appointment as investigating officer. *See Levite*, 24 M.J. at 337.

[79] *Id.* The findings, conclusions, and recommendations of the investigating officer never were included in the record. *See id.* at 339.

[80] *Id.* at 337-38.

[81] *Id.* at 334-35.

[82] *Id.* at 340.

[83] *Id.*

[84] *Id.*

[85] 30 M.J. 849 (N.M.C.M.R. 1990).

[86] 33 M.J. 669 (N.M.C.M.R. 1991).

sexual acts with female Marine recruits.[87] The only defense witnesses in *Jameson* were two fellow drill instructors who testified favorably on Sergeant Jameson's duty performance and rehabilitative potential. One witness stated that she disapproved of a homosexual relationship between a drill instructor and a recruit, but had "no bad opinion" of a homosexual affair immediately after the recruit completed training.[88] Both witnesses testified that they would be willing to work with the accused in the future, despite her conviction.[89] Within days, a verbatim transcription of their testimony was prepared and delivered to their respective battalion commanders, who relieved them of their duties as drill instructors and revoked their recruit training military occupational specialties. Both witnesses later received unfavorable fitness reports.[90]

The impact of the adverse actions taken against the two defense witnesses was immediate. Members of the command, perceiving these actions as retribution, concluded that "testifying for the defense could be hazardous to one's Marine Corps career."[91]

Considering Sergeant Jameson's appeal, the Navy-Marine Corps Court of Military Review declined to attribute any evil motive or intent to the commanders or staff officers involved in the adverse actions levied against the defense witnesses.[92] The court recognized that the command was dealing with a serious situation that impaired the good order, discipline and morale of the recruiting command, impacted on external relations with the families of current and prospective recruits, and could have generated unfavorable media attention.[93] Consequently, the court addressed "not the ends [the command sought to attain] but the means [by which it attained them], and the effects of the chosen means, including the timing thereof, on pending cases."[94] Finding "evidence sufficient to render reasonable a conclusion in favor of the allegation of [unlawful command influence]," the court set aside the convening authority's action.

The actions taken against witnesses who testified on Sergeant Jameson's behalf evidently harmed Sergeant Jones. One prospective defense witness refused to testify because of "rumors that two drill sergeants had been relieved . . . for testifying on behalf of Marines accused of homosexuality."[95] Although the military judge assured this witness that she would not be punished for testifying, the witness continued to refuse, stating that "in her opinion, such promises had been made and broken before."[96] An officer witness further indicated that the troops assigned to the command were "hesitant to testify because they [did] not want to see themselves relieved for expressing an opinion."[97] Although the battalion commander had held a meeting in which he ostensibly had encouraged witnesses to testify without fear of retaliation, the appellate court concluded that unlawful command influence was present.[98] The court remanded the case, asserting that

> the defense [had] presented evidence sufficient to raise the issue of command influence by showing that potential witnesses from the appellant's command were deterred from expressing . . . their candid opinions . . . because of destructively adverse personnel actions taken by the command against those who had testified [favorably for] other accused similarly situated to the [accused].[99]

---

[87] *See Jones*, 30 M.J. at 851. Jones and Jameson served as drill instructors in the same recruit training regiment at Parris Island, South Carolina. They were charged concurrently after the command completed an investigation of alleged lesbian activity in the regiment.

[88] *Jameson*, 33 M.J. at 670-71.

[89] *Id.*

[90] *Id.* at 671; *see also Jones*, 30 M.J. at 851. Both witnesses later obtained relief from the Board for Correction of Naval Records. *Jameson*, 33 M.J at 671.

[91] *Jameson*, 33 M.J. at 676-77.

[92] *Id.* at 674. "[W]e have no desire to attribute to the commander or their staff members involved in this case any agenda other than the best interests of their commands and the Marine Corps . . . ." *Id.*

[93] *Id.* at 673-74.

[94] *Id.*

[95] *Jones*, 30 M.J. at 851-52.

[96] *Id.* at 852.

[97] *Id.*

[98] The battalion commander essentially remarked that persons with relevant information were encouraged to testify for the defense, but that they would be held accountable for testimony that deviated from Marine Corps policy. *See Jameson*, 33 M.J. at 667. The appellate court found that the battalion commander's comments tended to induce listeners to avoid the trial process or to engage in fearful self-censorship. *Id.*

[99] *Jones*, 30 M.J. at 854.

Jones and *Jameson* demonstrate extreme examples of reprisals. Superiors more commonly exert unlawful command influence by "lecturing," "counseling," or "debriefing" defense witnesses after they have testified.[100] The appellate courts, concerned that such practices may discourage these witnesses or others from participating in the judicial process, have warned that these policies "cannot help but have a chilling effect on our judicial system."[101] Commanders and supervisors should refrain from these practices, given their limited efficacy and the very real possibility that they could rise to the level of unlawful command influence.

Remedial Measures: Repairing Unlawful Command Influence

Once unlawful command influence is identified, either actual or apparent, remedial measures are mandatory. Whenever possible, the command should act with the military judiciary to remedy the problem. When the task of correcting unlawful command influence falls solely to military judges or the appellate courts, the cleanup may be costly, time consuming, and individualized. Command-generated remedies, on the other hand, can clean up a problem in one fast sweep.

United States v. Sullivan[102] provides an excellent illustration of command-directed remedial action. Sullivan, an Air Force staff sergeant assigned to a military hospital, was one of four airmen accused of drug trafficking. Before Sullivan's trial, the hospital first sergeant implicitly threatened to harm the careers of potential defense witnesses, commenting at an NCO call that "derogatory comments concerning judgment could readily be inserted into . . . [the] efficiency reports" of any member of the command who testified on behalf of a drug offender.[103] The first sergeant also suggested that this testimony conflicted with Air Force policy. Nine days later, at a commanders' call, the hospital administrator similarly criticized officers who would testify on behalf of accused drug offenders. In the presence of the hospital commander, and with his implicit approval, the administrator also opined that such testimony violated Air Force policy. The commanders' call occurred *after* the trial defense counsel in a companion case had complained to the hospital commander about the first sergeant's inappropriate conduct.

Sullivan was the last of the four accused to be tried. In the preceding three trials, the counsel and the military judges thoroughly developed the facts surrounding the command's improper efforts to influence the military justice system. The command then "took immediate steps to rid the trials of taint,"[104] holding additional commander's calls to inform all hospital personnel of their duties to testify as defense witnesses if requested.[105] The wing commander sent a similar message to all personnel stationed at the air base.[106] Finally, the hospital first sergeant was transferred, eliminating his access to the rating process.[107]

In conjunction with the command action, the judge issued a blanket order directing the Government to produce all witnesses requested by the defense. Moreover, the judge assured each witness that no adverse consequences would ensue from his or her testimony.[108] With the command's cooperation, the judge granted liberal continuances to ensure that all corrective actions would be carried out completely and "to allow the cleansing process to work."[109]

Remedial action was effective in *Sullivan*. It was quick, thorough, well publicized, and supported from the top. It presents a sharp contrast to the attempted remedial measures in the 3d Armored Division, when the commanding general merely issued a four sentence retraction letter to combat the harmful effects of his many speeches.[110]

Episodes of actual and apparent unlawful command influence undoubtedly will recur in the future. The command and the judiciary must address each allegation quickly and decisively. Ignoring unlawful command influence invites disaster.

---

[100] *See* United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984).

[101] *Id.* at 696.

[102] 26 M.J. 442 (C.M.A. 1988).

[103] *Id.* at 442.

[104] *Id.* at 443.

[105] *Id.*

[106] *Id.*

[107] *Id.* The hospital administrator already had been reassigned. *See id.*

[108] *Id.*

[109] *Id.*

[110] The retraction letter was dated 4 March 1983. Six months later, the command issued a second letter that was considerably more detailed. *See* S. REP. No. 1, *supra* note 18, at 10. These letters, however, "were not effective remedial action necessary to cure the taint caused by the coments [sic] of [the commanding general] and his subordinates. Further, the retraction letters did not receive the emphasis nor dissemination required to address the problem." *Id.*

Command Action

The command is in the best position to correct unlawful command influence. The first step in this process is to determine the extent of the problem. The command must investigate the matter thoroughly, without attempting to resolve the problem covertly. Unlawful command influence is like an infection; it must be exposed to the air to dry it out. Any attempt to dispose of it discreetly merely reinforces a problem that thrives on innuendo and secrecy. "[T]he best way to dispel the appearance of evil is to publish the truth about the situation."[111]

Second, the chain of command must correct the misapprehension unequivocally by issuing a "new" policy that correctly states the law. Moreover, corrective guidance must be reinforced emphatically to overcome inertia and resistance to change. It must not contain any "winking" or "gentlemen's agreements." Unless a commander convincingly communicates the message, "I'm *not* kidding," his or her subordinates will continue their unlawful command practices. Their only response to the commander's guidance will be to exert their influences more discreetly.[112]

Third, the command may have to remove people from the positions from which they wielded unlawful influence.[113] This remedy more likely will be necessary when members of the chain of command actually have exerted unlawful command influence than when no more than an appearance of this evil exists. The ultimate commander must evaluate each removal individually with the advice of a well-informed SJA. At the very least, witnesses and prospective witnesses must be afforded protection.

Fourth, if the unlawful command influence was published in some form, the command must issue a strongly worded retraction immediately. The retraction must come from the same level in the command hierarchy, it must be disseminated at least as widely as the original, and it must receive the same degree of emphasis.[114] Moreover, the next higher echelon of command should become involved, condemning the unlawful influence and supporting the corrective action.[115]

Fifth, the command must address the impact of the unlawful command influence on pending courts-martial. Depending on the level of command involved in the taint, the command may have to reprefer the charges, reconsider the level of trial, reprocess the referral, or transfer the action to another command until the taint dissipates. Like a decision to remove a person from a position of influence, this decision is fact-specific and must be evaluated on its own merits. The Government also may have to honor judicial remedies, such as blanket orders to produce defense requested witnesses or requests for a new court-martial panel.

Finally, the command must follow up on corrective action to ensure that the new message has not been garbled in transmission. Without oversight, a remedy that otherwise might have been effective well might go awry.

Judicial Action

Military judges not only must cure any specific prejudice created by unlawful command influence, but also must dispel the appearance of unlawful command influence from the trial process. To assist them, judge advocates engaged in the judicial process must act immediately when allegations of unlawful command influence surface during a trial. Both the trial counsel and the defense counsel should apprise the military judge of any perceived unlawful command influence.[116] Although a military judge can remedy the problems of unlaw-

---

[111] *Cruz*, 20 M.J. at 890.

[112] Substantial evidence suggests that personnel in the 3d Armored Division gave little credence to the retraction letters. *See* S. REP. No. 1, *supra* note 18, at 68. For example, one battalion commander "publicly berated" a subordinate for providing favorable testimony at a trial six months *after* the commanding general issued the second retraction letter. *See id.*

[113] *See Sullivan*, 26 M.J. at 443.

[114] The retraction letters issued in the 3d Armored Division received neither the same emphasis, nor the same dissemination, as the "taint" they were intended to redress. *See* S. REP. No. 1, *supra* note 18, at 10. A retraction must be accompanied by visible corrective action. The command should schedule personal presentations to officers and NCOs to reinforce the retraction and to emphasize the corrective guidance.

[115] When the Army Chief of Staff, General John A. Wickham, Jr., learned of the contretemps within the 3d Armored Division, he asked, "What action was taken . . . to counsel the CG and his JAG? What action was taken to caution other convening authorities in Army?" *See id.* at 68. General Wickham concluded, "I am not happy with this situation." *See id.*

The Department of Defense Inspector General's report stated,

> None of the remedial action received the same emphasis, or had the same impact, as the original statements by [the commanding general] or the documents circulated by [the two command sergeants major]. As a minimum measure, the retraction of [the general's] message should have come from [the] Corps Commander or [higher] so that the emphasis on the retraction and remedy would have *matched* or *exceeded* the emphasis on the original statement.

See id. at 70 (emphasis added).

[116] Some commentators argue that the defense counsel should wait to raise unlawful command influence issues on appeal. This may be a valid tactical consideration; however, the author personally favors resolving such issues at trial, reserving the appellate process for issues that remain unresolved.

ful command influence only on a case-by-case basis, decisive action at the trial level will preclude a morass of problems on appeal.[117]

Judicial remedies for unlawful command influence abound. To protect the accused from adverse testimony generated by unlawful influence, the judge may preclude the Government from presenting testimony about the accused's poor potential for further service.[118] To produce favorable testimony that otherwise might have been chilled, the judge can order the Government to produce any witness requested by the defense attorney.[119] Moreover, when witnesses on the stand appear reluctant to testify, the military judge can advise them of the protections available to them through the military justice system. If a witness remains uncooperative, the judge can permit the defense counsel to enter a stipulation of the witness's expected testimony.[120] The judge then may amend his or her instructions to the panel to omit standard language addressing the opportunity to observe the demeanor of a witness.[121] When an allegation of unlawful command influence taints more than one case, the judge can take judicial notice of the records of trial of previous courts-martial.[122] To ensure that no unlawful command influence has affected the court, the judge can sustain challenges for cause.[123] If the court members are tainted, the judge can grant a mistrial.[124]

Although their purposes conflict, both the trial counsel and the defense counsel should create a record at trial to memorialize the adjudication of unlawful command influence allegations.[125] Obviously, the defense counsel will seek to support the allegations and the trial counsel will seek to rebut them.[126] If the allegations are investigated, the trial counsel should append a copy of the report to the record of trial.[127] Without this information, an appellate court likely will presume prejudice and order remedial action.

Proper Command Control

If prevention is the best cure for unlawful command influence, education is a close second. Troop leaders at all levels need to know that the only legitimate way that they may influence the outcome of a trial is to testify under oath inside the courtroom.[128] This does not mean that the command is precluded from issuing guidance or establishing policies concerning areas within its interest. Commanders properly may focus on problem issues, such as drug use and trafficking.[129] What the command *cannot* do is interject its policies into the courtroom, or attempt to use those policies to affect the testimony of a witness or the neutrality and independence of a court-martial.

Any attempt to influence the military justice system outside the courtroom is fraught with the danger of unlawful command influence. Commanders and judge advocates at all levels must be aware of the policies being communicated

[117] *See, e.g.*, United States v. Southers, 18 M.J. 795, 797 (A.C.M.R. 1984) (commending the military judge for creating remedies that not only cured any specific prejudice, but also dispelled the appearance of unlawful command influence).

[118] *See id.*

[119] *See* United States v. Sullivan, 26 M.J. 442, 443 (C.M.A. 1998).

[120] This remedy was used by the military judge in some of the cases arising out the 3d Armored Division. Interview with Lieutenant Colonel Wendell Jewell, *supra* note 30.

[121] *Id.*

[122] *Id.*

[123] *See Southers*, 18 M.J. at 797.

[124] *See* United States v. Brice, 19 M.J. 170, 172 (C.M.A. 1985).

[125] An extremely detailed record was produced in United States v. Giarratano, 20 M.J. 553 (A.C.M.R. 1985), *aff'd*, 22 M.J. 388 (C.M.A. 1986). Although this case was referred to a bad-conduct discharge special court-martial, the transcript comprises ten volumes and over 1400 pages. *See id.* at 554.

[126] To raise the issue of unlawful command influence, the accused must prove that the command's actions created at least the appearance of unlawful command influence. *See generally* United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987). A rebuttable presumption of prejudice arises if the accused meets this burden. *See* United States v. Allen, 31 M.J. 572, 590 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). Once the existence of unlawful command influence is established, the Government bears the burden of demonstrating that the trial was fair. *Id.*

An appellate court will look for evidence in the record that shows the extent to which unlawful command influence was exercised and the impact it had on the appellant's trial. *See* United States v. Karlson, 16 M.J. 469, 474 (C.M.A. 1983). In a case in which unlawful command influence has been exercised, a reviewing court may not affirm the findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence. *See* United States v. Wright, 37 C.M.R. 374, 394 (C.M.A. 1967).

[127] *See* United States v. Sullivan, 26 M.J. 442, 443 C.M.A. 1998) (corrective remarks addressed to personnel "tainted" by unlawful command influence were tape recorded, transcribed, and appended to the record of trial).

[128] Members of the chain of command also can influence the level of trial legally through their recommendations prior to referral. This is not the sort of influence to which this article alludes.

[129] United States v. Brice, 19 M.J. 170, 170 n.3 (C.M.A. 1985); *accord* United States v. Toon, 48 C.M.R. at 142. In *Toon*, the Army Court of Military Review commented,

> In this case, the clearly laudable objective of the commander was to reduce the drug traffic in his unit. Assuming the existence of a drug problem in the division, he would have been derelict as a commander had he not tried to solve the problem. While his command letter serves as a teaching vehicle by pointing out the undesirable features of drug use by members of a combat division, its principal emphasis was on aggressive use of the judicial process to eliminate drug traffickers from his unit and from the Army. Thus, his statement violates the basic rule permitting commanders to establish policy with respect to matters affecting discipline and morale within their units.

Id.

within the command. Moreover, an experienced judge advocate should review established policies and directives for traces of unlawful command influence. Commanders should announce policies and directives clearly and should ensure that they are correctly understood and properly executed.[130]

Commanders should realize that even legally acceptable guidance can lead to litigation of unlawful command influence issues. For example, in *United States v. Fernandez*,[131] a legally acceptable drug-abuse policy letter triggered intense appellate scrutiny. The commanding general of the 82d Airborne Division published a letter that characterized drugs as a "threat to combat readiness" and reminded subordinate commanders that "detection and treatment of drug abusers" was a "primary goal."[132] The general then opined that the drug problem would not be eliminated until drug trafficking ceased.[133] "[T]o stem the tide of illegal drug distribution," he directed subordinate commanders to "work closely" with law enforcement officials to "ferret out drug dealers," to consult with their trial counsel before initiating "any criminal or administrative action" against drug dealers,[134] to educate their soldiers on the adverse effects of drugs, and "personally [to] screen the names of all court member nominees . . . to insure that only the most mature officers and NCO's" were detailed to serve on courts-martial.[135]

The letter triggered review by two appellate courts, in part because it stated that "the full weight of the military justice system must be brought to bear against these criminals."[136] Fernandez argued that this language revealed the commanding general's inability to act impartially in the exercise of his posttrial duties as convening authority.

The Court of Military Appeals ultimately found no prejudice to the accused. Noting that the letter also indicated the possibility of administrative actions against identified drug dealers, the court concluded that, "taken as a whole [the letter] indicate[d] a flexible mind regarding the legally appropriate ways in which to deal with drug dealers."[137] Nevertheless, commanders considering issuing similar policy letters would be well advised to avoid the language contained in the *Fernandez* letter.

The *Fernandez* opinion appears to balance command policies that are vague, but legal, against those that are specific, but illegal. One can offer no valid criticism of a commander's advice to his or her subordinates to consider the full range of possible dispositions for each case. Moreover, a commander properly may characterize illegal drugs as a threat to combat readiness, and "ferreting out" illegal drug dealers clearly is a legitimate command concern. Problems arise, however, when a letter evinces a commander's inelastic attitude about the disposition of drug cases. An appellate court may infer this impermissible rigidity from a commander's directive that accused drug offenders always should be tried by courts-martial, rather than handled administratively; from language indicating the commander's predisposition to approve certain sentences; or from evidence that the commander intended to disregard legal standards during posttrial reviews.[138] Any policy that threatens to impose a specific punishment upon a member of a particular class of offenders—or even states that the "full weight of the military justice system must be brought to bear" against these wrongdoers[139]—should be avoided.

Commanders also should be sensitive to possible misinterpretations of policy guidance. To avoid confusion, they should phrase their guidance with great care. For example, when discussing the selection of courts-martial members, a commander should not use the word "mature" as a euphemism for persons predisposed to impose severe punishments.[140]

Guidance best is issued in the absence of current controversy. This approach, of course, is contrary to human nature. Commanders tend to promulgate policies in response to problems requiring corrective measures. Even so, a commander should consider the timing of a directive in conjunction with

---

[130] *See* S. REP. No. 1, *supra* note 18, at 11.

[131] 24 M.J. 77 (C.M.A. 1987).

[132] *Id.* at 78.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 79.

[137] *Id.*

[138] *See* United States v. Howard, 48 C.M.R. 939, 943 (C.M.A. 1974).

[139] *Fernandez*, 24 M.J. at 79.

[140] *See* United States v. McClain, 22 M.J. 124 (C.M.A. 1986).

its subject and should evaluate the directive's impact on pending cases. As the Court of Military Appeals remarked in *United States v. Brice*,[141] "the confluence of subject and timing, particularly as they affect the minds—however subtly or imperceptibly—of the triers of fact in [a] particular case" is particularly significant.[142]

A subordinate commander should remember that he or she retains personal discretion in charging decisions and referral recommendations. If a convening authority disagrees, he or she may dismiss the charges, "refer [them] to a higher level of court-martial than initially recommended or even withdraw [them] from a lesser court-martial . . . to refer them to a greater one."[143]

A convening authority should remember that he or she legitimately may limit the discretion of subordinate commanders by requiring them to forward cases involving specific types of offenses to the convening authority for personal disposition.[144] This arrangement frees the convening authority from the temptation subtly to pressure subordinate commanders to produce a certain result.

Conclusion

Unlawful command influence is everyone's problem. No acceptable substitute exists for a fair trial. Commanders and judge advocates must identify unlawful command influence problems quickly and expose them immediately. Unlawful command influence problems will not "just go away." They thrive on rumor and innuendo, and can be resolved only by a massive dose of corrective action.

History shows that, even when it is exerted for legitimate purposes, command control can have a tremendous impact on the military justice process. This impact often is unintentional and unforeseen. Because similar problems will recur over time, commanders must emphasize professional education for young officers and junior NCOs. Early recognition of potential problem areas is the key to controlling unlawful command influence. Unfortunately, a judge advocate who is several echelons removed from daily activities in line units cannot identify unlawful command influence early in its life cycle. True success in controlling unlawful command influence will come only if junior leaders learn from past mistakes and senior commanders publicly discourage this evil.

[141] 19 M.J. 170 (C.M.A. 1985).

[142] *Id.* at 172 n.3.

[143] GILLIGAN & LEDERER, *supra* note 1, § 8-16.00.

[144] *Id.* (citing United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973)).

The Clergy Privilege

Captain Michael J. Davidson
Litigation Division, OTJAG

Introduction

In a court-martial, the admissibility of evidence and testimony is governed by the Military Rules of Evidence (MRE). Modeled after their federal counterparts, these evidentiary rules follow the premise that relevant evidence should be admitted at a court-martial "unless there is a clear danger that it will lead to inaccurate fact-finding."[1]

In general, the MREs are designed to facilitate the search for truth.[2] A rule of evidence that establishes a "privilege," however, often will prevent relevant information from reaching the trier of fact. Typically, a court will neither favor such a rule,[3] nor construe it expansively.[4]

The concept of privilege derives from a prevailing societal belief that some values are so important that they justify

[1] RICHARD O. LEMPERT & STEVEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 645 (2d ed. 1983).

[2] CHARLES T. MCCORMICK, ON EVIDENCE § 72, at 170-71 (3d ed. 1984).

[3] Robinson v. Magovern, 83 F.R.D. 79, 85 (W.D. Pa. 1979).

[4] United States v. Nixon, 418 U.S. 683, 710 (1974); *see also In re* Grand Jury Investigation, 918 F. 2d 374, 383 (3d Cir. 1990) (construing privilege strictly); United States v. Mandel, 415 F. Supp. 1025, 1030 (D. Md. 1976) ("the law sustains a claim of privilege only when necessary to protect and preserve the interest of significant public importance that the specific privilege is designed to serve"); MCCORMICK, *supra* note 2, at 175 ("[s]ince privileges operate to deny litigants access to . . . evidence, the courts have generally construed them no more broadly than necessary to accomplish their basic purposes").

restrictions on the truth-finding process.[5] The privilege that protects the confidentiality of the information an individual discloses when seeking spiritual guidance exemplifies this concept. Traditional justifications for the clergy privilege include public policy concerns for religious liberty[6] and for "the encouragement of the communication without which [the relationship between cleric and communicant] cannot be effective."[7] In applying the clergy privilege, the military courts rely primarily on the latter justification.[8] In a military environment in which service members often must endure prolonged separations from their families and sometimes may find themselves suddenly facing combat, the need for unfettered, confidential access to a spiritual advisor is particularly pronounced.[9]

In *Trammel v. United States*,[10] the Supreme Court explained that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive consolation and guidance in return."[11] As our nation's courts have recognized, the clergy-communicant relationship "is so important, indeed so fundamental to the western tradition, that it must be 'sedulously fostered.'"[12]

History of the Clergy Privilege

The origin of the clergy privilege is traced to the Seal of Confession of the Catholic Church, which provides that "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion."[13] Acknowledged by Pope Leo I in the fifth century, this dictate appears in the earliest records of the Catholic Church.[14]

In large part, American jurisprudence finds its roots in the common law of England. Strongly influenced by the Church, pre-Reformation English law respected the Seal of Confession. This practice may have begun as early as the reign of William the Conqueror, who seized the English throne in 1066. Early English law specifically excepted traitors from the protection of the clergy privilege, but otherwise applied the privilege freely to preserve the confidentiality of the confessional.[15]

Following the English Reformation of the sixteenth century, the Anglican Church gradually discarded the clergy privilege. By the seventeenth century, English courts altogether refused to recognize the privilege.[16] Consequently, the

---

[5] *Nixon*, 418 U.S. at 710 n.18 (citing Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also* McCORMICK, *supra* note 2, at 171 (the rules of privilege "are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice").

[6] *See* Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring) ("sound policy-reason and experience—concedes to a religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession . . . ."); Thomas C. Oldham, *Privileged Communications in Military Law*, 5 MIL. L. REV. 17, 35 (1959) ("[i]t is manifest that the penitential relation deserves recognition and support in view of our nation's constitutional guarantee of freedom of religion"). *But see generally* Robert L. Stoyles, Jr., *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967) (asserting that the priest-penitent privilege as typically applied may be unconstitutional).

[7] McCORMICK, *supra* note 2, at 171. Commentators sometimes refer to the theory that the courts should not chill communications between clerics and communicants as the "utilitarian justification." *See id.* The military has articulated a similar rationale for its privilege rules. *See* MANUAL FOR COURTS-MARTIAL ¶ 137*b*, at 182 (1949) [hereinafter 1949 MANUAL]; JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE § 1417*b*, at 374 (1953) (commenting on the military's "recognition of the public advantage that accrues from encouraging free communication in such circumstances"). The protection of privacy interests in certain significant human relationships is another—albeit more recent—privilege justification. *See* McCORMICK, *supra* note 2, at 172.

[8] *See supra* note 7 and accompanying text; *see also* United States v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985) (remarking that the application of the clergy privilege "demonstrates the military' s sensitivity to preserving the confidentiality of communications to clergy"); United States v. Kidd, 20 C.M.R. 713, 718 (A.B.R. 1955) (the privilege's "*raison d'etre* is the 'recognition of the public advantage that accrues from encouraging free communication'").

[9] Oldham, *supra* note 6, at 38-39. For a recent discussion of the problems encountered by chaplains during Operation Desert Storm, see Adde, *There Are No Atheists in Foxholes*, ARMY TIMES, Jan. 28, 1991, at 37. The article notes that a commander frequently will refer a troubled subordinate to a chaplain because the subordinate knows that a conversation with the chaplain will remain confidential. *Id.* at 40.

[10] 445 U.S. 40, 53 (1980).

[11] *Id.* at 51.

[12] *In re* Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990) (citing 8 JOHN H. WIGMORE, EVIDENCE § 2285 (John T. McNaughten ed., rev. ed. 1961)).

[13] THE CODE OF CANON LAW IN ENGLISH TRANSLATION, Canon 983 (Collins, trans. 1983) *cited in* Mary H. Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 735 n.60 (1987).

[14] Mitchell, *supra* note 13, at 736.

[15] *Id.*

[16] *Id.* at 736-37; *see also* 81 AM. JUR. 2D *Witnesses* § 284, at 299 (1976) (after the Reformation, "the common law did not recognize a privilege with regard to communications to clergymen or other church or ecclesiastical officers"); Mullen v. United States, 263 F.2d 275, 278 (D.C. Cir. 1958) (finding the privilege abrogated or abandoned).

clergy privilege was not among the common-law principles that English colonists brought to this country. It exists in American law today primarily as a creature of statute.[17]

A United States court first recognized the clergy privilege in 1813. In *People v. Phillips*,[18] the prosecution called a Catholic priest to testify against several individuals charged with trafficking in stolen goods. The accused previously had confessed to the priest and had asked him to return the stolen merchandise to its rightful owners. The priest refused to testify, citing the Seal of Confession. The New York Court of General Sessions upheld the priest's refusal to divulge information that "had been confessed to him in the administration of the sacrament of Penance."[19] It based this decision on the priest's right to freedom of religion under the New York Constitution.[20]

Only four years later, however, another New York court refused to extend the clergy privilege to an accused murderer's communications with a Protestant clergyman. In denying the privilege, the court emphasized that "auricular confessions were not required in the course of discipline prescribed by the canons of [the accused's] church."[21]

Responding in part to these conflicting decisions, the New York legislature passed the nation's first statute to recognize a clergy privilege. Enacted in 1828, the statute encompassed any "'minister of the gospel, or priest of any denomination whatsoever' as to confessions 'enjoined by the rules [or] practice of such denominations.'"[22]

A federal court first implicitly acknowledged a clergy privilege in *Totten v. United States*.[23] In this 1875 decision, the Supreme Court assumed the existence of the privilege while discussing the public policy considerations against disclosing the existence of a contract for wartime services between President Abraham Lincoln and a Union spy.[24] For almost one century, this dictum remained the primary authority for the existence of a federal clergy privilege. Finally, in 1958, Judges Fahy and Edgerton of the Court of Appeals for the District of Columbia recognized the clergy privilege as a matter of federal common law.[25]

In 1972, the Supreme Court approved a proposed set of Federal Rules of Evidence (FRE) that included thirteen specific rules governing evidentiary privileges.[26] Among these thirteen rules was proposed FRE 506, which specifically provided for a clergy privilege.[27]

The proposed privilege rules proved controversial.[28] Congress ultimately declined to enact proposed FRE 506. Instead, it adopted FRE 501,[29] thereby "manifesting [its] affirmative intention not to freeze the law of privilege."[30]

---

[17] 81 AM. JUR. 2D *Witnesses* § 284, at 299 (1976); Annotation, *Matters to Which the Privilege Covering Communications to Clergymen on Spiritual Matters Extends*, 71 A.L.R. 3D 794, 799 (1976); *see* United States v. Moreno, 20 M.J. 623, 625 (A.C.M.R. 1985); *Mullen*, 263 F.2d at 278 (D.C. Cir. 1958).

[18] *See* Annotation, *supra* note 17, at 798.

[19] *Id.*

[20] Mitchell, *supra* note 13, at 737.

[21] Annotation, *supra* note 17, at 798 (citing Smith's Case, 2 N.Y. City Hall Rec. 77 (1817)).

[22] N.Y. Rev. Stat., pt. 3, ch. 7, tit. 3, § 72 (1828), *cited in* Mitchell, *supra* note 13, at 738.

[23] 92 U.S. 105 (1875).

[24] *Id.* at 107.

[25] Mullen v. United States, 263 F.2d 275, 276 (D.C. Cir. 1958) (Fahy, J., concurring) (finding inadmissible the testimony of a Lutheran minister that a criminal defendant had confessed to chaining her children); *cf. id.* at 281 (Edgerton, J., concurring) ("I think that [any] communication made in reasonable confidence . . . and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding . . . "). Declaring that the defense counsel's failure to object to the testimony of the minister at trial had constituted plain error, the concurring judges found a basis for the clergy privilege in Federal Rule of Criminal Procedure 26. *Id.* at 277-78. Rule 26 allowed a federal court to recognize a clergy privilege based on "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *See id.* at 278-79; Mitchell, *supra* note 13, at 739 n.90; *see also In re* Contemporary Mission, Inc., 44 B.R. 940, 943 (Bankr. D. Conn. 1984) (holding that the priest-penitent privilege is recognized by federal common law).

[26] Mitchell, *supra* note 13, at 739; *see* Federal Rules of Evidence, 56 F.R.D. 183, 230-61 (1972) (proposed Nov. 20, 1972). The proposed rules were drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States. *See* Trammel v. United States, 445 U.S. 40, 47 (1980).

[27] *See* Federal Rules of Evidence, 56 F.R.D. at 247 (proposed FRE 506); Mitchell, *supra* note 13, at 739.

[28] The clergy-communicant privilege was one of the least controversial of the proposed privileges. *See In re* Grand Jury Investigation, 918 F.2d 374, 381 (3d Cir. 1990).

[29] MCCORMICK, *supra* note 2, at 181; Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation*, 130 MIL. L. REV. 5, 15 (1990). Federal Rule of Evidence 501 recognized and established a federal common law of privileges. *See* Lederer, *supra*, at 15 n.38.

[30] *Trammel*, 445 U.S. at 47.

As originally adopted, FRE 501 resembled Rule 26 of the existing Federal Rules of Criminal Procedure.[31] Consequently, it had no substantial effect on the law of privileges in federal criminal cases.[32] In essence, Congress returned the responsibility for developing the rules of privilege to the courts, evidently expecting the judiciary to develop these rules on a case-by-case basis.[33]

Military Rule of Evidence 503: Communications to Clergy

Commentators identified the need for a military evidentiary privilege for clerical communications as early as 1868.[34] Nevertheless, for decades military law made almost no provision for a clergy privilege.[35] The military did not recognize this privilege formally until the conclusion of World War II.[36] Even then, it initially applied the privilege only to communications made to chaplains by individuals subject to military law.[37]

The military's current clergy privilege is the product of an interservice effort to codify rules of evidence. This effort eventually culminated in a 1980 executive order in which President Jimmy Carter amended the Manual for Courts-Martial and promulgated the Military Rules of Evidence.[38] In drafting specific privilege rules, and in recommending their adoption,[39] the Working Group for the Joint Service Committee on Military Justice considered the comprehensive body of privileges already contained in the 1969 *Manual for Courts-Martial*[40] and the difficulties military personnel experience in obtaining legal advice.[41] Military Rule of

---

[31] *See generally* FED. R. CRIM. P. 26 (amended 1972). As promulgated in 1948, Federal Rule of Criminal Procedure 26 provided, "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." *See In re* Grand Jury Investigation, 918 F.2d at 377 n.3.

[32] MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 1.02, at 1-6 (1989); *see also In re* Grand Jury Investigation, 918 F.2d at 377 n.3.

[33] *Trammel*, 445 U.S. at 47; Eckmann v. Board of Educ., 106 F.R.D. 70, 73 (E.D. Mo. 1985); Robinson v. Magovern, 83 F.R.D. 79, 85 n.3 (W.D. Pa. 1979); Mitchell, *supra* note 13, at 740. Although Congress never adopted proposed Rule 506, many commentators view this unenacted rule as "a guiding formulation of the [clergy] privilege and a source of federal common law." *See, e.g.*, Mitchell, *supra* note 13, at 742 (citing *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (extending privilege to nonclergy draft counselors working as minister's assistants)); *see also In re* Grand Jury Investigation, 918 F.2d at 374 (referring to proposed FRE 506 in interpreting the scope of FRE 501). Another purpose of FRE 501 was to promote the development of a uniform body of rules of evidence for federal criminal trials—at least, to the extent that privileges under that rule were to be the products of federal common law. *See* LARKIN, *supra* note 32, at 1-7.

[34] STEVEN V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 304 (6th ed. 1868). Discussing the clergy privilege statutes in New York and Missouri, Captain Benet remarked, "[S]ome [commentators have] contended that an exception should be made to a Catholic priest, upon the ground that confession in the Roman Catholic church is a religious duty, and that to compel the disclosure by means of punishment, would be in effect to punish the party for religious opinions." *Id.*

[35] *See* MANUAL FOR COURTS-MARTIAL, United States (1895) (containing no provision for clergy privilege); BENET, *supra* note 34, at 302 ("clergymen have, it seems, no such privilege"). The Army's Manuals for Courts-Martial for 1917, 1920, and 1928 made no mention of a clergy privilege; nor did *Naval Courts and Boards*, 1937. *See* United States v. Coleman, 26 M.J. 407, 409 n.3 (C.M.A. 1988). Colonel William Winthrop opined in his military law treatise that communications to clergy were not privileged because no United States statute protected these communications. *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 331-32 (2d ed. reprint 1920).

In 1917, paragraph 46 1/2 of the Army Regulations—which expressly required chaplains to counsel enlisted soldiers under arrest before trial—declared that all "communications, verbal or written, between [a] chaplain and [an] enlisted [service member] subject to trial or discipline shall be treated as confidential and privileged." R. HONEYWELL, CHAPLAINS OF THE UNITED STATES ARMY 296-97 (1958). In 1925, the provision dealing with privileged communications was deleted. *See id.* at 297. Nevertheless, an Army Air Corps chaplain later was permitted to invoke a clergy-communicant privilege at a 1943 Pacific theater court-martial after the local commanding general announced that, "in his command[,] any confidences given to chaplains in the performance of their duties should be privileged." *Id.* at 296.

[36] The January 1946 *Bulletin of The Judge Advocate General of the Army* contained the following directive:

> Privileged communications. A communication to an Army chaplain of any denomination from a person subject to military law, made in the relationship of priest or clergyman and penitent, either as a formal act of religion as in the confessional or one made as a matter of conscience to a chaplain in his capacity as such or as clergyman, is as a matter of policy privileged against disclosure, unless expressly waived by the individual concerned, before an investigating officer, court-martial, court of inquiry or board of officers, or in any other proceeding wherein the testimony of the chaplain is otherwise competent and admissible.

V JAG BULL. 4 (1946); *see also* 1949 MANUAL, *supra* note 7, ¶ 137*b*, at 182 (recognizing a clergy privilege); CONRAD D. PHILOS, HANDBOOK OF COURT-MARTIAL LAW 318 (1951) (citing United States v. Ambabo, 2 C.M.R. (AF) 646, 666 (A.F.B.R. 1949); V JAG BULL. 4 (1946) as authority supporting the existence of a clergy privilege); HONEYWELL, *supra* note 35, at 297. For a discussion of evidentiary privileges as they existed under the 1951 *Manual for Courts-Martial*, see generally Oldham, *supra* note 6.

[37] Oldham, *supra* note 6, at 35 (citing 1949 MANUAL, *supra* note 7, ¶ 137*b*). The 1951 *Manual for Courts-Martial* extended the privilege to protect communications made to *any* clergyman. *See* MANUAL FOR COURTS-MARTIAL, United States, ¶ 151*b* (2) (1951); Oldham, *supra* note 6, at 35.

[38] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). *See generally* Lederer, *supra* note 29.

[39] For a discussion regarding the drafting of the current Military Rules of Evidence, see generally Lederer, *supra* note 29.

[40] *See generally* MANUAL FOR COURTS-MARTIAL, United States (rev. ed. 1969) [hereinafter 1969 MANUAL].

[41] Lederer, *supra* note 29, at 15.

Evidence 503, the evidentiary rule by which the military now protects confidential communications to a clergyman or a clergyman's assistant, derives from provisions of the 1969 *Manual for Courts-Martial*[42] and proposed FRE 506(b).[43]

Obviously, a communication is not rendered privileged merely because it is made to a cleric or a cleric's assistant. Like its counterparts in civilian jurisdictions,[44] MRE 503 imposes a number of requirements that a party claiming to be a religious communicant must meet before a court may deem his or her communication privileged.[45] Significantly, however, a communicant need not disclose the content of the communication to the court to enable the court to determine whether the communication is privileged.[46]

Nature of the Communication

To invoke the clergy privilege, an individual must show that he or she originally disclosed the information at issue "either as a formal act of religion or as a matter of conscience."[47] This requirement comports with pre-Rules military case law.[48] Consequently, not all communications made to a cleric will be protected. For example, the privilege does not preclude the admission of information that a party communicated to a clergyman acting only as a friend,[49] a business associate,[50] a public official, or a fortuitous bystander.[51]

Several legal commentators have suggested that MRE 503's protection is as broad as that of proposed FRE 506—which would have extended the clergy privilege "to all confidential communications with a [cleric] in his [or her] professional capacity."[52] Broadly worded to protect not only "formal acts of religion," but also communications concerning "matter[s] of conscience," MRE 503 should not be limited to preserving the confidentiality of religious confessions.[53] It should protect *any* information that a communicant relates in confidence to a cleric who is acting as a spiritual advisor.[54] In particular, the privilege should encompass conversations in which a communicant speaks with a cleric to obtain "spiritual solace

---

[42] 1969 MANUAL, *supra* note 40, ¶ 151*b* (2).

[43] *See* MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 503 analysis, app. 22, at A22-36 (1984) [hereinafter MCM]; *see also* Lederer, *supra* note 29, at 26 ("military privilege rules were taken in part from the 1969 Manual for Courts-Martial and the proposed but unenacted Federal Rules of Evidence dealing with privileges, and were written partially from scratch"); Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5, 20 (1981) ("Rule 503 of the M.R.E. is a recodification of the Manual's statement of the [clergy] privilege, plus an adoption of the definition of 'clergyman' found in the proposed F.R.E.").

[44] Annotation, *supra* note 17, at 799.

[45] *See* United States v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985).

[46] 97 C.J.S. *Witnesses* ¶ 263, at 747 (1957) (citing *In re* Swenson, 237 N.W. 589 (Minn. 1931)).

[47] MCM, *supra* note 43, MIL. R. EVID. 503(a); *see* United States v. Coleman, 26 M.J. 407, 409 (C.M.A. 1988). The plain language of MRE 503, however, "does not limit the [clergy] privilege to situations when [a communicant's] *sole* purpose is to be shriven." *Moreno*, 20 M.J. at 626 (emphasis added).

[48] STEVEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 434 (2d ed. 1986); *see* United States v. Kidd, 20 C.M.R. 713 (A.B.R. 1955); *see also* Oldham, *supra* note 6, at 34 (discussing the clergy privilege under the 1951 *Manual for Courts-Martial*).

[49] *Cf. Coleman*, 26 M.J. at 407 (no privilege attached to communication when the accused viewed cleric not as a clergyman, but as a relative); United States v. Garries, 19 M.J. 845, 859 (A.F.C.M.R. 1985) (declining to apply clergy privilege to the accused's communication to a deacon who never held himself out to the accused as anything other than a friend); Smith's Case, 2 N.Y. City Hall Rec. 11 (1817) *cited and discussed in* Erwin S. Barbre, Annotation, *Who Is Clergyman or the Like Entitled to Assert Privilege Attaching to Communications to Clergyman or Spiritual Advisors?*, 49 A.L.R. 3D 1205, 1209 (1973). In *Smith's Case*, the court distinguished "between auricular confessions made to a priest in the course of discipline according to the canons of [the Catholic] church, and . . . confidential statements made to a minister of the gospel merely as a friend or advisor." *See* Smith's Case, 2 N.Y. City Hall Rec. at 11.

[50] Oldham, *supra* note 6, at 37-38; *e.g.*, United States v. Gordon, 493 F. Supp. 822 (N.D.N.Y. 1980).

[51] Mitchell, *supra* note 13, at 745 (citing Burger v. State, 231 S.E.2d 769, 771 (Ga. 1977) (holding that a statement in which the accused revealed his intent to kill his wife and her lover to a cleric who was the accused's "friend and frequent companion" was not privileged); Wainscott v. Commonwealth, 562 S.W.2d 628, 633 (Ky.), *cert. denied*, 439 U.S. 868 (1978) (communication to minister as a friend is not privileged)); *see also Coleman*, 26 M.J. at 407 (accused's communications to his father-in-law, a clergyman, were not privileged); United States v. Dube, 820 F.2d 886 (7th Cir. 1987) (accused's conversation with a cleric about the accused's efforts to avoid paying taxes were not privileged).

[52] *See* SALTZBURG et al., *supra* note 48, at 433.

[53] Oldham, *supra* note 6, at 37. The term "formal act of religion" corresponds to the term "course of discipline" used in many civilian statutes that formerly restricted the scope of the clergy privilege to communications made in the confessional. *Id.*; *cf. Moreno*, 20 M.J. at 626 (remarking that MRE 503 is broader in scope than most civilian statutes).

[54] 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 506-3 (1988) ("[t]he choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his [or her] professional character as spiritual advisor has been exercised in favor of the latter"); *cf.* Mitchell, *supra* note 13, at 749 ("as long as the confider consults the cleric in the cleric's professional capacity and in confidence, the law should not put its ear to the key hole").

and comfort or [to] unburden[] himself [or herself] of matters weighing on his [or her] conscience."[55] Areas such as marriage counseling,[56] personality problems,[57] and the decision to claim conscientious objector status[58] all should fall under the protection of MRE 503. This broad interpretation of the evidentiary rule would remove the need for judges to define ministerial roles and would preclude the appearance of federal encroachment on the free exercise of religion.[59]

Who Is a Clergyman?

Military Rule of Evidence 503 defines a clergyman as "a minister, priest, rabbi, chaplain or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman." The clergyman must be someone "regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full time basis."[60] The term "clergyman" includes individuals of either sex[61] and it is not limited to counselors of the same religious denomination as the communicant.[62]

Although the evidentiary rule does not require a cleric to be licensed or certified by law,[63] it excludes self-proclaimed ministers[64] and religious functionaries who do not possess spiritual counseling responsibilities.[65] Moreover, a clergyman must be a natural person—not a religious organization or corporation.[66]

In determining whether to apply the protections of a clerical privilege statute, a court normally will examine the pastoral counseling requirements of the religious denomination involved.[67] In *Reutkemeier v. Nolte*,[68] for instance, an Iowa court held that an individual's communications with Presbyterian elders fell within the clergy privilege. Examining the doctrine and policy of the Presbyterian Church, the court noted that the elders dealt solely with the spiritual concerns of the church[69] and were authorized to conduct church sessions

---

[55] Oldham, *supra* note 6, at 37.

[56] Counseling conducted to preserve the sanctity of marriage "definitely [is] within the functions and duties of a minister." Mitchell, *supra* note 13, at 750 n.156 (citing LeGore v. LeGore, 31 Pa. D. & C.2d 107, 108 (1963)).

[57] *Cf.* 2 WEINSTEIN & BERGER, *supra* note 54, at 506-3 (remarking in discussion of proposed FRE 506 that counselling to ease personality disorders "fall[s] readily into the realm of the spirit").

[58] *Cf. In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (draft counseling); Mitchell, *supra* note 13, at 750 ("statutes with broad definitions of privileged communications . . . should cover counseling sessions").

[59] Mitchell, *supra* note 13, at 745-46 (citing WILLIAM H. TIEMANN & JOHN C. BUSH, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 111-16 (2d ed. 1983) (asserting that a state definition of "church" or "minister" would constitute establishment of the groups meeting the definition)).

[60] Proposed Rules of Evidence, 51 F.R.D. 315, 372 (1971) (advisory committee note on proposed FRE 506); SALTZBURG et al., *supra* note 48, at 424. The applicability of the privilege to communications in sects such as the Jehovah 's Witnesses, in which each member is considered to be a minister, is uncertain. The reasonable belief exception to MRE 503, however, would protect the communicant if he or she reasonably believed that he or she was confiding in a cleric, even if the confidant failed to satisfy the rule's requirements. *See* 2 WEINSTEIN & BERGER, *supra* note 54, at 506-8.

[61] MCM, *supra* note 43, MIL. R. EVID. 503 analysis, app. 22, at A22-36.

[62] *See, e.g.*, United States v. Moreno, 20 M.J. 623 (A.C.M.R. 1985) (Catholic communicant and Baptist minister).

[63] 2 WEINSTEIN & BERGER, *supra* note 54, at 506-8; *see also In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (applying privilege to communications with draft counselors, not all of whom were ordained ministers).

[64] SALTZBURG et al., *supra* note 48, at 434; 2 WEINSTEIN & BERGER, *supra* note 54, at 506-2, 506-8; *cf. In re* Grand Jury Investigation, 918 F.2d 374, 384 n.13 (3d Cir. 1990) ("we do not intimate that the privilege should be interpreted to comprehend communications to and among members of sects that denominate each and every member as clergy"); United States v. Dube, 820 F.2d 886 (7th Cir. 1987) (mail-order cleric in tax avoidance scam); State v. Hereford, 518 So. 2d 515 (La. Ct. App. 1987) (self-ordained minister).

[65] *See* United States v. Garries, 19 M.J. 845, 859 (A.F.C.M.R. 1985) (no privilege attached to communications with deacon who was not given spiritual counseling responsibilities).

[66] United States v. Luther, 481 F.2d 429 (9th Cir. 1973).

[67] *See Garries*, 19 M.J. at 859; *cf. In re* Grand Jury Investigation, 918 F.2d at 387 n.21. In *In re Grand Jury Investigation*, the Third Circuit remarked,

> [W]e believe that establishing the pastoral counseling practices of a particular denomination to ascertain the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances of a particular case.

Id.

[68] 161 N.W. 290 (Iowa 1917).

[69] *Id.* at 293.

when a pastor was not available.[70] Moreover, the elders were "ministers of the gospel" as contemplated by the Presbyterian Confession of Faith and by Iowa statute. Accordingly, the court deemed communication with the elders privileged.

In *In re Murtha*,[71] however, a New Jersey court held that a Catholic nun[72] could not claim New Jersey's clergy privilege to protect the confidentiality of her conversations with a youth suspected of homicide. In reaching this decision, the court emphasized that the Catholic Church had not authorized the nun to assume the spiritual duties associated with the priesthood and noted that the nun could not point to any tenet in Catholic doctrine that would allow her to claim the privilege.[73]

In a continuation of pre-Rules practice,[74] MRE 503 specifically protects communications made to a cleric's assistant.[75] The assistant, however, must be an individual whose activities conform "at least in a general way" with those of other recognized clergy.[76] Moreover, the assistant either must have administrative,[77] spiritual, or counseling responsibilities[78] or must serve as a mere conduit of information to the cleric.[79]

Military Rule of Evidence 503 includes an exception that encompasses confidential communications made to a lay person that the communicant reasonably believes to be a clergyman.[80] Although the rule does not define this exception clearly, it evidently parallels the reasonable belief provisions of the attorney-client privilege[81] and the proposed psychotherapist-patient privilege.[82] Another parallel may appear in the widespread judicial acceptance of the validity of a marriage performed by an unauthorized person when the bride and groom reasonably believed in the qualifications of the marrying official.[83]

Military Rule of Evidence 503 clearly states that a communicant's belief must be reasonable if he or she is to claim the clergy privilege. Accordingly, a court should require the communicant to show that he or she exercised a certain degree

---

[70] *Id.*

[71] 279 A.2d 889 (N.J. Super. Ct. App. Div. 1971); *see* Barbre, *supra* note 49, at 1210 (1973)).

[72] The nun, a dedicated member of a teaching order, had undergone a four-year training period that included instruction on religious life; however, she did not carry out the traditional priestly functions of hearing confessions or giving absolution. *See* Barbre, *supra* note 49, at 1210.

[73] *Id.*; *see also* Masquat v. Maguire, 638 P.2d 1105 (Okla. 1981) (finding that a hospital patient's conversation with a nun-administrator was not privileged in a medical malpractice suit because the patient had consulted the nun only in her capacity as an administrator). *But cf.* Eckmann v. Board of Educ., 106 F.R.D. 70 (E.D. Mo. 1985) (privilege extended to a conversation with a nun acting as a spiritual director when this office was recognized in the Catholic Church as a form of ministry of the gospel and was undertaken by both priests and nuns).

[74] SNEDEKER, *supra* note 7, at 374 ("with respect to disclosing or conniving to disclose communications which are subject to the penitent and clergyman privilege, the clergyman's agent, such as his [or her] interpreter or assistant, . . . occupies the same position as does his [or her] principal"); 1949 MANUAL, *supra* note 7, ¶ 137*b*, at 182 (confidential communications are "privileged against disclosure by the chaplain, or by his interpreter or any of his [or her] assistants"); *cf.* Oldham, *supra* note 6, at 41 (the presence of an agent of either party to an attorney-client conference will not destroy the confidential nature of the communication).

[75] MCM, *supra* note 43, MIL. R. EVID. 503(a). "A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman *or to a clergyman's assistant* . . . ." *Id.* (emphasis added).

[76] *In re* Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971); *Eckmann*, 106 F.R.D. at 72-73 (because the clergy privilege applies to individuals "functioning as clergymen," confidential communications to a nun who "performed a number of priestly functions" were privileged).

[77] *See* LARKIN, *supra* note 32, at 10-12; *cf. id.* at 227 (the attorney-client privilege is not lost when a communication is made or entrusted to the necessary administrative agents of the attorney).

[78] *Eckmann*, 106 F.R.D. at 72-73; *see also* United States v. Garries, 19 M.J. 845, 859 (A.F.C.M.R. 1985) (privilege did not protect an accused's communications to a deacon who had no spiritual counseling responsibilities and no substantive pastoral duties).

[79] The drafters acknowledged that military life often requires the transmission of information through third parties. *See* MCM, *supra* note 43, MIL. R. EVID. 503(b)(2) analysis, app. 22, at A22-36.

[80] MCM, *supra* note 43, MIL. R. EVID. 503(b)(1); *cf. Garries*, 19 M.J. at 860 (finding no evidence that the accused reasonably believed the recipient of the communication to be a clergyman).

[81] *See* MCM, *supra* note 43, MIL. R. EVID. 502(b)(2) ("[a] 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to practice law"); *cf.* United States v. Boffa, 513 F. Supp. 517, 521 (D. Del. 1981) (privilege extends to a person who confides in an individual in the genuine, but mistaken, belief that the individual is an attorney); United States v. Ostrer, 422 F. Supp. 93, 97 (S.D.N.Y. 1976) (attorney-client privilege exists when the client has a good faith, albeit erroneous, belief that the person he or she has consulted is a lawyer who is acting on his or her behalf). *But cf.* Dabney v. Investment Corp. of Am., 82 F.R.D. 464 (E.D. Pa. 1979) (holding that the privilege did not cover information that officers of a corporate client related to a law student because the officers knew that the student was not admitted to the bar and the student was not acting as the agent or associate of a duly licensed attorney).

[82] 2 WEINSTEIN & BERGER, *supra* note 54 at 506-3. For a general discussion of the psychotherapist privilege, see generally David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL. L. REV. 31 (1989).

[83] 2 WEINSTEIN & BERGER, *supra* note 54, at 506-3.

of caution before engaging the services of a self-proclaimed cleric.[84]

Confidential Communications

To be considered confidential, a communication must be "made to a clergyman in the clergyman's capacity as a spiritual advisor or to a clergyman's assistant in the assistant's official capacity."[85] The communicant must not intend to permit the cleric or the assistant to disclose the communication "to third persons other than those to whom disclosure is in the furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication."[86]

The communicant's intent is important.[87] The privilege will not preserve a communication's confidentiality if the communicant neither intends, nor expects, the person in whom he or she confides to keep this information secret.[88] The privilege, however, is broad enough to include both oral and written statements if the communicant makes them in confidence.[89] The rule also permits the communicant to prevent an eavesdropper from disclosing information that the communicant had intended to relate confidentially.[90] To convey information in the obvious presence of a third party, however, destroys its confidentiality.[91]

Analogous to the attorney-client privilege, MRE 503 protects information as confidential if it is communicated "to other persons present in the furtherance of the purposes of the communication."[92] Accordingly, a military court should apply the clergy privilege to the communications of a married couple who consult a clergyman jointly.[93] Similarly, the privilege may protect the confidentiality of information that a number of people convey to a cleric during a group counselling session.[94] Finally, a communication remains confidential when the primary recipient of the communication must share its contents with third parties whose duties and relationships to the recipient entitle them to learn this information.[95]

Who May Claim the Privilege?

Military Rule of Evidence 503(c) specifically empowers a communicant to claim the clergy privilege.[96] Moreover, the

---

[84] *Cf.* LARKIN, *supra* note 32, §§ 2.02, 2-24 n.59.1 ("belief must be reasonable in order to lay claim to the protections of the privilege and a reasonable degree of precaution in engaging the services of the person must be demonstrated").

[85] MCM, *supra* note 43, MIL. R. EVID. 503(b)(2).

[86] *Id.*

[87] SALTZBURG et al., *supra* note 48, at 434 (the definition of confidential communications turns on the penitent's intent); *see also* United States v. Moreno, 20 M.J. 623, 627 (A.C.M.R. 1985) (accused's intent, not the cleric's impression of that intent, controls).

[88] 2 WEINSTEIN & BERGER, *supra* note 54, at 506-9; United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (finding that the accused did not intend a priest to keep confidential a letter in which the accused asked the priest to contact the Federal Bureau of Investigation); United States v. Gordon, 493 F. Supp. 822, 823 (N.D.N.Y. 1980) (purpose of communication was to convey message to third party); *see also* United States v. Garries, 19 M.J. 845 (A.F.C.M.R. 1985) (accused never asked his neighbor, a deacon, to consider their conversations confidential).

[89] SALTZBURG et al., *supra* note 48, at 434; *cf. Wells*, 446 F.2d at 4; United States v. Martel, 19 M.J. 917, 927 (A.C.M.R. 1985) (spousal privilege protects communicative acts).

[90] MCM, *supra* note 43, MIL. R. EVID. 503(b)(2) analysis, app. 22, at A22-36. The 1949 *Manual for Courts-Martial* similarly maintained the privilege against disclosure by third parties who, by accident or design, overheard the confidential communication. *See* 1949 MANUAL, *supra* note 7, ¶ 137*b*, at 182.

[91] *See* United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (holding that the obvious presence of a security officer destroyed the confidentiality of a prisoner's confession to a prison chaplain); *cf.* MCCORMICK, *supra* note 2, at 176 (most recent court decisions hold only that a privilege will not protect communications made under circumstances in which interception reasonably could be anticipated).

[92] MCM, *supra* note 43, MIL. R. EVID 503(b)(2); *cf.* Cimijotti v. Paulson, 219 F. Supp. 621 (N.D. Iowa 1963) (communication remained privileged when communication was made known to a third person whose religious duty and relationship to the primary recipient of the confidential information entitled the third person to learn that information).

[93] 2 WEINSTEIN & BERGER, *supra* note 54, at 506-9.

[94] The Court of Appeals for the Third Circuit held that the privilege was not necessarily lost when unrelated, unmarried individuals met with a minister for group spiritual counseling. *In re* Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990). The court noted, however, that the privilege would not apply when numerous persons, each seeking individual spiritual guidance, choose to meet with a cleric in a group, unless this group meeting is necessary to further the purposes of their communications. *Id.* at 386 n.19.

[95] *Cf. Cimijotti*, 219 F. Supp. at 624 (N.D. Iowa 1963) (applying Iowa clergy-communicant privilege when church discipline required the cleric to bring in church elders to hear the communication).

[96] *Cf.* 2 WEINSTEIN & BERGER, *supra* note 54, at 506-13 (noting that proposed FRE 506 provided that the privilege belonged to the communicant). *But cf.* Eckmann v. Board of Educ., 106 F.R.D. 70, 73 (E .D. Mo. 1985) (under federal law, the privilege belongs to the clergyman).

cleric, or the cleric's assistant, may claim the privilege on the communicant's behalf.[97] Their "authority . . . to do so is presumed in the absence of evidence to the contrary."[98]

The evidentiary rule "contains no specific exceptions. In particular, the penitent's stated intent to commit a crime does not negate the privilege."[99]

A communicant may claim the clergy privilege in or out of court.[100] Consequently, a cleric cannot reveal confidential communications to criminal investigators, at a pretrial investigation under Uniform Code of Military Justice (UCMJ) article 32, or at a trial, without the communicant's consent.[101] Conversely, parties other than a communicant may call the court's attention to the existence of the privilege, or may claim it on the communicant's behalf, but they cannot claim the privilege over the communicant's objection.[102]

Waiver of the Privilege

As a general rule, only the holder of a privilege has the power to waive it.[103] Waiver normally occurs when the holder intentionally relinquishes a known right;[104] however, a holder who voluntarily discloses a confidential communication waives the privilege even if the holder did not know that the communication was privileged.[105] Moreover, if a holder voluntarily compromises a communication's confidentiality, or allows that confidentiality to be compromised, the holder's attempts to reclaim the privilege will fail.[106]

A communicant does not waive the clergy privilege merely by testifying on his or her own behalf,[107] nor is the privilege lost if the cleric testifies about matters not directly related to the confidential communication.[108] If the communicant testifies about the communication during direct examination, however, the privilege is waived and the opposing counsel may cross-examine the communicant thoroughly on the matter.[109] Furthermore, if the opposing counsel asks the communicant on cross-examination about a confidential communication and the communicant responds without asserting the privilege,[110] the privilege is waived.[111]

Conclusion

Although it is broader than the protections afforded by many state statutes, and probably is as broad as proposed FRE 506, the military's clergy privilege requires a communicant to satisfy certain specified criteria before he or she may claim the protection of the privilege. If exercised, the privilege would exclude otherwise admissible evidence; therefore, a court will construe the privilege narrowly and will enforce its prerequisites strictly. Nevertheless, this important evidentiary rule protects an individual's fundamental right to unfettered access to a spiritual counselor without impeding the search for truth or impairing the integrity of the judicial system.

---

[97] MCM, *supra* note 43, Mil R. Evid. 503(c).

[98] *Id.*; *see* Saltzburg et al., *supra*, note 48, at 434. Proposed FRE 506 also gave the cleric prima facie authority to claim the privilege on behalf of the communicant. *See* 2 WEINSTEIN & BERGER, *supra* note 54, at 506-13.

[99] SALTZBURG et al., *supra* note 48, at 434.

[100] United States v. Moreno, 20 M.J. 623 (A.C.M.R. 1985).

[101] *Id.*; *see also* United States v. Martel, 19 M.J. 917, 921-22 (A.C.M.R. 1985) (rules governing privileges are applicable at an article 32 investigation).

[102] *See* MCCORMICK, *supra* note 2, at 173 & n.4 (citing Touma v. Touma, 357 A.2d 25 (N.J. Super. Ct. App. Div. 1976) (holding that a marriage counselor is not entitled to assert a privilege waived by both spouses); Commonwealth *ex rel.* Romanowicz v. Romanowicz, 248 A.2d 238 (Pa. Super. Ct. 1968) (a doctor may not assert physician-patient privilege against the patient's wishes)).

[103] 81 AM. JUR. 2D *Witnesses* ¶ 146 (1976).

[104] Woodruff, *supra* note 43, at 66 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)); SALTZBURG et al., *supra* note 48, at 481 ("the standard for a voluntary waiver is an intentional relinquishment of a known right"); *cf.* United States v. Richards, 17 M.J. 1016, 1020 (N.M.C.M.R. 1984) (accused waived privilege when he asked a cleric to "bring [the accused's] confession to the attention of the command").

[105] Woodruff, *supra* note 43, at 66 (citing 8 JOHN H. WIGMORE, EVIDENCE § 2327 (John T. McNaughten ed., rev. ed. 1961)); SALTZBURG et al., *supra* note 48, at 481 ("[t]he waiver . . . will stand even if the disclosure was made without the holder realizing the impact of the disclosure").

[106] SALTZBURG et al., *supra* note 48, at 480-81.

[107] United States v. Martel, 19 M.J. 917, 930 (A.C.M.R. 1985); *see* MCM, *supra* note 43, MIL. R. EVID. 510(b) analysis, app. 22, at A22-40 ("an accused who testifies in his or her own behalf does not waive the privilege unless the accused testifies voluntarily to the privileged matter of communication"); *cf.* MCCORMICK, *supra* note 2 at 224 ("the mere voluntary taking of the stand by the client as a witness in a suit to which he [or she] is party and testifying to facts which were the subject of consultation with his [or her] counsel is no waiver of the [attorney-client] privilege").

[108] *See* Mullen v. United States, 263 F.2d 275, 277 n.2 (D.C. Cir. 1958) (cleric as a character witness).

[109] *Id.*; *see also* MCM, *supra* note 43, MIL. R. EVID. 510 (disclosure of any significant part of the communication "under such circumstances that it would be inappropriate to claim the privilege defeats and waives the privilege").

[110] Whenever possible, claims of privilege should be raised at an UCMJ article 39(a) session or at a sidebar. *See* MCM, *supra* note 43, MIL. R. EVID. 512 analysis, app. 22, at A22-40. An ethical attorney who knows that a witness will claim a valid privilege will not call that witness solely to impress this claim of privilege upon the panel. *See* SALTZBURG et al., *supra* note 48 at 487. Similarly, asking a question on cross-examination to induce the witness to claim the privilege in the presence of the panel would be improper.

[111] *Cf.* MCCORMICK, *supra* note 2, at 224 (discussing the attorney-client privilege).

DAD Notes

Postsentencing Sentencing Procedures?

What happens when an irregularity is discovered in the proceedings or the sentence of a court-martial after the sentence is announced? This issue arises relatively infrequently; consequently, when it does arise, confusion abounds. The Army Court of Military Review recently attempted to eliminate some of this confusion in *United States v. Jackson.*[1]

In *Jackson*, the military judge properly instructed the panel on the voting procedures it should use in sentencing the accused. After trial, however, one of the panel members informed the staff judge advocate's office that the panel had failed to follow the judge's instructions. Specifically, the members began with the harshest sentence, rather than the lightest, when they voted upon the proposed sentences.[2]

When the military judge learned of this error, he ordered a posttrial session, which was held almost a month after the court-martial had adjourned. After verifying that an error actually had occurred, the military judge declared a "mistrial as to the sentencing" and ordered a rehearing on the sentence before the same panel members to correct the voting error. The Government and the defense counsel presented all of the original sentencing evidence, with the unexplained exception of the testimony of the accused's wife, and the military judge issued new sentencing instructions. After redeliberation, the panel returned with a sentence identical to the one it had issued before.[3]

On review, the Army court disputed the military judge's characterization of his actions as granting a "mistrial," noting that the judge actually had used the "proceedings in revision" procedures of Rule for Courts-Martial (R.C.M.) 1102.[4] The court acknowledged that a military judge may grant a mistrial as to sentencing when this result is "manifestly necessary in the interests of justice,"[5] but pointed out that the declaration of a mistrial withdraws the case from the panel.[6] Accordingly, when a military judge declares a mistrial as to the sentence, the convening authority must appoint a new panel of members to adjudge the sentence.[7] A proceeding in revision, on the other hand, does not amount to a withdrawal of charges;[8] therefore, the military judge may conduct this proceeding with the original members.[9]

---

[1] CM 9100761 (A.C.M.R. May 29, 1992).

[2] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1006(d)(3)(A) (1984) [hereinafter MCM]. Rule for Courts-Martial 1006 requires members of a court-martial to vote on each proposed sentence in its entirety, beginning with the least severe penalty and continuing, as necessary, to more severe sanctions, until they adjudge a sentence. *See id.*

[3] *Jackson*, slip op. at 6-7.

[4] *Id.*, slip op. at 11. Rule for Courts-Martial 1102 provides, in pertinent part,

> (a) *In general.* Post-trial sessions may be proceedings in revision or Article 39(a) sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.
>
> (b) *Purpose.*
>
> (1) *Proceedings in revision.* Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused.
>
> ....
>
> (c) *Procedure.*
>
> ....
>
> (2) *Action.* The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

[5] MCM, *supra* note 2, R.C.M. 915.

[6] *Id.*, R.C.M. 915(c)(1).

[7] *Jackson*, slip op. at 11 n.10.

[8] United States v. Wilson, 27 M.J. 555, 558 (A.C.M.R. 1988).

[9] *Id.*

The Army court also ruled that the procedures the military judge used in *Jackson* did not amount to a reconsideration of the sentence.[10] Rule for Courts-Martial 1009 provides that, after a court-martial announces a sentence, the "sentence may be reconsidered by the members . . . before authentication of the record of trial."[11] A member of the panel that announced the original sentence, the military judge, or the convening authority may initiate a reconsideration. No matter who actually proposes the reconsideration, however, the military judge must instruct the court-martial on the procedures for reconsideration and the members must vote by secret written ballot to decide whether to reconsider the sentence.[12] In *Jackson*, the members did not vote on this issue.[13]

After declaring that neither a mistrial, nor a reconsideration of the sentence, had taken place, the Army court analyzed the facts in *Jackson* to determine whether the members had conducted a permissible revision hearing. The court noted that revision proceedings may be used only to correct errors that are not substantive and that materially do not prejudice the rights of the accused.[14] The members' original misapplication of the sentencing instructions, however, had amounted to "substantive error."[15] Finding that a proceeding in revision was inappropriate under these circumstances, the Army court set aside the sentence and ordered a rehearing.[16]

Jackson's lesson is simple: a trial defense counsel must analyze the unique situations arising from irregularities in sentencing proceedings to determine what procedures must be used to correct any errors that may occur. In *Jackson*, the trial defense counsel acquiesced to the military judge's analysis. Fortunately for the accused, the Army court declined to apply waiver.[17] The appellate courts, however, are not always so accommodating. Rather than relying on the military judge, the trial defense counsel should conduct an independent review. Defense counsel will find that the opinion in *United States v. Jackson* is an excellent starting point. Captain Norris.

A Government Tightrope with No Net—Impeachment upon the Basis of Race

Experienced defense counsel realize that the outcome of a trial occasionally may turn on the effective impeachment of a key witness.[18] In *United States v. Harris*,[19] the Army Court of Military Review measured the extent to which the Government may attack the credibility of a key defense witness by attempting to show the witness's racial bias.

Captain Harris, a black officer commanding a company-sized detachment, was accused of extorting sexual favors from, and indecently assaulting, two white, female enlisted soldiers assigned to his unit. In a trial before an all-white panel, each alleged victim testified that Harris had called her into his office, had threatened her with nonjudicial punishment[20] for various minor infractions, and then had offered to drop the action in exchange for sexual favors. Each testified that Harris had fondled her breasts or her vaginal area before she left his office.[21]

The defense counsel argued that Harris was the object of a scheme that his alleged victims, Private *M* and Private *C*, had devised to avoid nonjudicial punishment. Accordingly, the attorney concentrated on challenging the credibility of these witnesses.

---

[10] Jackson, slip op. at 11.

[11] MCM, *supra* note 2, R.C.M. 1009.

[12] *Id.*

[13] Jackson, slip op. at 11.

[14] *See id.* Revision proceedings have been used properly in a number of situations. *See, e.g., Wilson*, 27 M.J. at 555 (new sentencing proceeding because two members had not been sworn); United States v. Feld, 27 M.J. 537 (A.F.C.M.R. 1988) (resolution of an ambiguity in the announced sentence), *petition for review denied*, 28 M.J. 235 (C.M.A. 1989); United States v. Crowell, 12 M.J. 760 (N.M.C.M.R. 1985) (repetition of sentencing proceeding after the verbatim tape recording of proceedings was lost), *petition for review denied*, 23 M.J. 281 (C.M.A. 1986). *But see* United States v. Scaff, 26 M.J. 985 (A.F.C.M.R.) (revision proceedings cannot be used to reopen a case or to allow the factfinder to change the findings or sentence after considering newly discovered evidence), *returned for DuBay hearing*, 29 M.J. 60 (C.M.A. 1989); United States v. Silva, 19 M.J. 501 (A.F.C.M.R. 1984) (revision proceedings may not be used to correct a flawed instruction to the members), *aff'd*, 22 M.J. 343 (C.M.A. 1986).

[15] *Jackson*, slip op. at 11.

[16] *Id.*, slip op. at 13.

[17] *Id.*, slip op. at 12.

[18] "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." MCM, *supra* note 2, MIL. R. EVID. 608(c); *see also* Davis v. Alaska, 415 U.S. 308 (1974); United States v. Burns, 25 M.J. 817, 819 (A.F.C.M.R.), *petition for review denied*, 27 M.J. 1 (C.M.A. 1988).

[19] CM 9100619 (A.C.M.R. May 21, 1992).

[20] *See generally* UCMJ art. 15.

[21] *Harris*, slip op. at 1.

During the defense case-in-chief, several witnesses expressed their poor opinions of the alleged victims' characters for truthfulness. Mr. Brown, a black man, was the defense's key impeachment witness against Private *M*. Brown testified on direct examination that *M* had spoken with him on several occasions and that, in the course of these conversations, she implied that she had framed Harris with a false complaint of sexual molestation. Brown emphasized that he and Harris were not acquainted when *M* divulged this information. Private *M*'s disclosures disturbed Brown. He later reported them—first to a black defense counsel at Fort Dix, then to Harris' military defense counsel.[22]

On cross-examination, the trial counsel attempted to show that Brown was racially biased. Over defense objection, the military judge permitted the trial counsel to question Brown about Brown's efforts to establish a chapter of the National Association for the Advancement of Colored People (NAACP) in the Fort Dix area. The judge similarly permitted the trial counsel to question Brown about Brown's interest on behalf of the NAACP in drunk driving cases involving Fort Dix soldiers, particularly drill sergeants. After establishing Brown's involvement with the NAACP, the trial counsel directed the court's attention to an unrelated drunk driving incident involving a Sergeant Smith. The trial counsel inferred that Brown had been interested in that case only because Sergeant Smith was black. Brown responded that when he first became involved in the case, he had not known that Smith was black. After the trial counsel asked several more questions about the NAACP and Brown's knowledge of the number of black drill sergeants at Fort Dix, the defense counsel again objected on grounds of irrelevance. The military judge, however, allowed the Government to continue. The following colloquy ensued:

> [Questions by the trial counsel].
>
> Q. Mr. Brown, isn't it just true that you [are] just an activist with a very strong belief in the NAACP?
>
> A. No.
>
> Q. Isn't the only reason you're here or even here for any reason is that Captain Harris is black?
>
> A. No, I didn't even know he was black.
>
> ....
>
> REDIRECT EXAMINATION
>
> (Questions by the defense:)
>
> Q. Mr. Brown, is it a crime to be interested in being a member of the NAACP?
>
> A. No, it's not.
>
> Q. Any crime to be black?
>
> A. No, it's not.[23]

The gist of the trial counsel's cross-examination was that Brown was biased in Harris' favor because Harris and Brown were members of the same race. The trial counsel implied that Brown was lying to aid a fellow black man and to further Brown's goal of establishing a local NAACP chapter.

On appeal, the defense counsel argued that the trial counsel's examination had been racially inflammatory and had prejudiced Harris' right to a fair hearing. The Government responded that the trial counsel had conducted a legitimate cross-examination under Military Rule of Evidence (MRE) 608(c)[24] into Brown's possible racial bias.[25]

The Army court acknowledged that, under the Military Rules of Evidence, proof of bias, prejudice, or motive to lie is relevant to impeach a witness.[26] The court, however, emphasized that the admissibility of this evidence is always subject to the limitations of MRE 403.[27] Applying that rule, the court concluded that the military judge should not have permitted the trial counsel to continue the cross-examination. It held that the judge's failure to control the scope of cross-examination was an abuse of discretion that allowed the court members to consider improper factors that may have influenced their critical decision on Brown's credibility.[28] Accordingly, the court set aside the findings and the sentence.

Equally important, the court held that the unfair prejudice to Harris implicit in the trial counsel's cross-examination of Brown far outweighed the value of any proof of bias, prejudice, or motive to lie that the trial counsel might have elicited.

---

[22] *Id.*, slip op. at 2.

[23] *Id.*, slip op. at 3-6.

[24] MCM, *supra* note 2, MIL. R. EVID. 608(c).

[25] *Harris*, slip op. at 6.

[26] *Id.* slip op. at 6 (citing United States v. Burns, 25 M.J. 817 (A.F.C.M.R.), *petition for review denied*, 27 M.J. 1 (C.M.A. 1988)); *see also* MCM, *supra* note 2, MIL. R. EVID. 608(c); Davis v. Alaska, 415 U.S. 308 (1974).

[27] In pertinent part, MRE 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."

[28] See Harris, slip op. at 6.

The court noted that the evidence developed by the trial counsel's questions had little, if any, probative value. Instead of a probing examination of Brown's direct testimony, which might have elicited information about Brown's motives to fabricate, or to exaggerate, his conversations with *M*, the court heard an emotional appeal to disbelieve Brown because he was a purported NAACP activist, bent on helping a fellow black even if that meant committing perjury.[29]

The court found this line of questioning inherently prejudicial, noting that it created a substantial risk that whatever biased or inaccurate preconceptions the members might have harbored about blacks would infect the panel's deliberative process. This risk, the court noted, was especially acute in a racially sensitive, black-on-white sexual assault case tried before an all-white panel.[30]

Harris is an excellent tool for defense counsel to use to determine what evidence and inferences relating to racial bias an attorney may use to impeach a witness. Although the Military Rules of Evidence permit an inquiry into racial bias, cross-examination that produces evidence of little or no probative value, but appeals to a member's racial or ethnic bias, "has no place in a criminal trial."[31] Government counsel occasionally may be tempted to impeach witnesses on the basis of racial bias, but they should be reminded that the costs related to this tactic may be dear. Captain White.

United States v. Hall Revisited

A note recently published in *The Army Lawyer* addressed the constitutionality of Uniform Code of Military Justice (UCMJ) article 125 as it applies to heterosexual, noncommercial, private acts of sodomy between consenting adults.[32] The note specifically addressed conflicting decisions on this issue by the Army and Air Force Courts of Military Review.[33] The Court of Military Appeals since has rendered two decisions in which it apparently put the issue to rest.

In *United States v. Henderson*,[34] the Court of Military Appeals held that article 125's prohibition of consensual heterosexual fellatio does not violate an accused's right to privacy. Henderson, a Marine Corps recruiter, received consensual fellatio from a sixteen-year-old female cadet enrolled in the Marine Corps Junior Reserve Officer Training Corps program.[35] He appealed his conviction for sodomy on two grounds, claiming that (1) UCMJ article 125 was not intended to proscribe consensual fellatio; and (2) his conduct fell within a constitutionally protected zone of privacy.

Analyzing the history of UCMJ article 125, the court concluded that the article does prohibit consensual fellatio. The court also rejected Henderson's constitutional argument, adhering instead to the methodology the Supreme Court used in *Bowers v. Hardwick*[36] to uphold the constitutionality of a Georgia law prohibiting consensual homosexual sodomy. In applying this analysis, the Court of Military Appeals noted that the Supreme Court had framed its discussion in terms of whether the drafters of the Constitution had conferred a fundamental right upon private individuals to engage in the prohibited conduct, not whether the prohibition itself was wise or desirable.[37] The Supreme Court then had "focused on the specific activity in question, rather than on some generalized notion of a 'right to be let alone.'"[38] In affirming Henderson's sodomy conviction, the Court of Military Appeals declined to invalidate an act of Congress without authority from the Supreme Court.

The court decided *United States v. Fagg*[39] on the same grounds. In a brief opinion, it reversed the Air Force court's decision that UCMJ article 125 was unconstitutional as applied to private, heterosexual, noncommercial acts of oral sex between consenting adults.

---

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see also* United States v. Cole, 31 M.J. 272 (C.M.A. 1990).

[32] DAD Note, United States v. Hall: *The Army Court of Military Review's Stand Against Consensual Heterosexual Sodomy*, ARMY LAW., Apr. 1992, at 42.

[33] *See id.*; *see also* United States v. Hall, 34 M.J. 695, (A.C.M.R. 1992) (accused's right to privacy was not violated by court-martial for heterosexual sodomy consisting of anal intercourse between consenting adults who were not husband and wife); United States v. Fagg, 33 M.J. 618 (A.F.C.M.R. 1991) (if no compelling governmental interest justifies intrusion into consenting, adult, heterosexual, noncommercial, private acts of oral sex, the accused's constitutional right of privacy protects the accused from prosecution), *rev'd*, 34 M.J. 179 (C.M.A. 1992).

[34] 34 M.J. 174 (C.M.A. 1992).

[35] In deciding this appeal, the Court of Military Appeals disregarded the status and age of the woman.

[36] 478 U.S. 186, 190-91 (1986).

[37] *Henderson*, 34 M.J. at 177 (citing *Hardwick*, 478 U.S. at 190).

[38] *Id.* (quoting *Hardwick*, 489 U.S. at 190).

[39] 34 M.J. 179 (C.M.A. 1992).

The results in *Henderson* and *Fagg* are consistent with the ruling of the Army Court of Military Review in *Hall*. Accordingly, they resolve the interservice conflict previously reported in *The Army Lawyer*.

On 28 May 1992, the Court of Military Appeals granted review in *Hall* to consider whether article 125 is unconstitutional as applied in that case. The court, however, did not order final briefs from appellate counsel, and the *Henderson* and *Fagg* decisions suggest that the court will resolve *Hall* in the Government's favor.

The Air Force defense appellate branch intends to petition the Supreme Court for a writ of certiorari in *Fagg*. *Henderson* is not yet ripe for Supreme Court review because the Navy-Marine Corps Court of Military Review set aside and dismissed several other charges against Henderson and authorized a sentence rehearing[40] that, so far, has not been completed. Undoubtedly, the outcome in *Fagg* will influence the defense attorneys' decisions to petition the Supreme Court in *Henderson* and *Hall*. In the meantime, counsel should consider consensual heterosexual fellatio constitutionally punishable under the UCMJ. Captain Heaton.

Clerk of Court Note

Army Trials in Southwest Asia— A Data Base Report

A proposal of the Judge Advocate General of the Navy to amend the UCMJ sparked controversy at the May 1992 judicial conference of the Court of Military Appeals.[41] Premised upon certain findings by the Secretary of the Navy and the commander of the Marine Corps field forces in Operation Desert Storm, this proposal would restrict the procedural rights of an accused tried under the UCMJ in a hostile-fire pay zone.[42] These restrictions include suspending an accused's right to demand trial in lieu of nonjudicial punishment, the right to trial by a court-martial with court members, and the right to be represented by individual military counsel.[43]

This note will not debate the merits of this proposal, but will describe what the Army Court-Martial Information System (ACMIS) data base reveals about the trials Army units conducted while deployed in the Persian Gulf. The release of this information should promote a more enlightened debate—although, as we shall see, the data base does not include every fact that should be considered.

The following table shows the total number of general courts-martial (GCM), special courts-martial (SPCM), and bad conduct discharge special courts-martial (BCDSPCM) tried throughout the Army in fiscal year (FY) 1991; the number of trials conducted in Southwest Asia during an almost identical period (October 1990 to November 1991); and the percentages of cases tried by different types of courts-martial. Not surprisingly, convening authorities in Southwest Asia showed a greater tendency than their contemporaries in the United States, Germany, and Korea, to use BCDSPCMs and SPCMs.

Type of Courts-Martial Convened

		Percentage of Total Cases		
	Total Cases	GCM	BCDSPCM	SPCM
Army-wide	1855	63.4	31.8	4.8
SW Asia	70	41.4	41.4	17.1

Guilty pleas were somewhat more common in Southwest Asia than they were throughout the Army as a whole. As the following table reveals, this trend was particularly pronounced in GCMs.

Cases Involving Guilty Pleas

		Percentage by Type of Court		
	Total Cases	GCM	BCDSPCM	SPCM
Army-wide	58.2	57.9	60.6	45.5
SW Asia	64.3	75.9	58.6	50.0

Seventy-eight percent of the guilty pleas in cases tried in Southwest Asia—that is, thirty-five of forty-five cases—involved plea bargains. The ACMIS data base reveals that in three of these plea agreements, the accused waived UCMJ article 32 investigations. Two other plea agreements involved referrals of charges to lower courts.[44] Unfortunately, the data stored in ACMIS does not include sentence limitations; therefore, one cannot determine from the data base whether any plea agreements were unusually lenient.

---

[40] *See* United States v. Henderson, 32 M.J. 941, 947 (N.M.C.M.R. 1991).

[41] *See* Soraya S. Nelson, *Trial by Jury Might Be Ruled Out in War Zone*, ARMY TIMES, May 18, 1992, at 17.

[42] *Id.*

[43] *See Id.*

[44] In each case, the charges were referred to a BCDSPCM.

Eighty percent of the trials conducted in Southwest Asia were by judge alone—a figure twelve percent higher than the Army-wide average. Relatively few cases in Southwest Asia were tried by court members: eleven accused were tried by courts with enlisted members and three were tried by courts composed entirely of officers.

Trials with Court Members

	Percentage by Type of Court			
	All Cases	GCM	BCDSPCM	SPCM
Army-wide	32.2	32.7	30.1	42.3
SW Asia	20.0	24.1	10.3	33.3

In part, the following table summarizes the forums and guilty pleas involved in the seventy Army trials reported from Saudi Arabia and Iraq:

Army Trials in Southwest Asia, 1990-1991

	Total	Judge (Pleas)	Enlisted (Pleas)	Officer (Pleas)
GCM	29	22 (20)	6 (1)	1 (1)
BCDSPCM	29	26 (16)	2 (1)	1 (0)
SPCM	12	8 (6)	3 (0)	1 (0)
Total	70	56 (42)	11 (2)	3 (1)

In no case tried in Southwest Asia was an accused represented by individual military counsel or civilian counsel. The ACMIS, however, does not reveal whether an accused in any case sought individual military or civilian counsel. The data base does show that seven of the seventy trials followed the accused's demands for trials in lieu of nonjudicial punishment. In two of the seven trials, the accused also objected to trials by summary courts-martial.

The overall conviction rate in Southwest Asia was 88.6 percent—approximately five percent less than the Army-wide average in FY 1991 of 93.4 percent. Notably, however, the conviction rate through April 1992 for accused who were tried in Germany and the United States for offenses they allegedly committed in Southwest Asia was only sixty-nine percent.

Processing times have been calculated from records of trial that the Clerk of Court received for review by the Army Court of Military Review and from records received for examination by the Examination and New Trials Division. In Southwest Asia, GCMs concluded an average of twenty-nine days after charges were preferred or initial restraint imposed—much faster than the Army-wide average of forty-six days. Curiously, in Southwest Asia, BCDSPCMs—which do not require pretrial article 32 investigations—on average took one day longer to process than GCMs.

The average posttrial processing time for GCMs in Southwest Asia also was less—by seven days—than the Army-wide average. For no apparent reason, obtaining a convening authority's action on a BCDSPCM generally took five days longer than it would for a GCM.

The coming months may bring additional debate over the Navy's proposal to amend the UCMJ. The author hopes this information will prove useful in resolving issues concerning the operation of the military justice system in Southwest Asia.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Contract Law Notes

Bid Guarantee and Surety Bond Update

Acceptable Bid Guarantees for Defense Construction Contracts

Before its recent revision,[1] the Defense Federal Acquisition Regulation Supplement (DFARS) limited the types of bid guarantees that offerors could submit for construction contracts. Contractors could provide as guarantees only separate bid bonds, United States bonds, Treasury notes, or other public debt obligations of the United States.[2] The Defense Acquisition Regulatory (DAR) Council intended this restriction to relieve Defense Department activities of the responsibility for safeguarding certified checks, cash, and other liquid assets that otherwise would have been acceptable under part 28 of the Federal Acquisition Regulation (FAR).[3] If an offeror submitted a bid guarantee in a form other than

[1] *See* 48 C.F.R. ch. 2 (1992).

[2] *See* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 252.228-7007(a) (1 Apr. 1984).

[3] *See* 52 Fed. Reg. 48,549 (1987).

that prescribed by the DFARS, the contracting officer would reject the bid as nonresponsive.[4] As rewritten, however, the DFARS neither incorporates the previous restriction, nor limits the type of bid guarantee that an offeror may submit. Contracting officers now must refer to the FAR to determine whether the form of an offeror's bid guarantee is acceptable.[5]

OFPP Authorizes Letters of Credit in Lieu of Performance and Payment Bonds

The Office of Federal Procurement Policy (OFPP) has revived a pre-FAR provision[6] authorizing construction contractors to submit irrevocable letters of credit in lieu of performance and payment bonds.[7] The OFPP did so to enhance the competitive positions of small businesses, which often have difficulties obtaining surety bonds. Although the Bonds Examination Team of the Contract Appeals Division regularly reviews performance and payment bonds for legal sufficiency,[8] contract attorneys in the field also should be aware of this new process.

Not all letters of credit will suffice as bond substitutes. A contractor must obtain letters of credit from a federally-insured financial institution that has an "investment-grade" or higher rating from a recognized commercial rating service. Because the government does not maintain a list of acceptable financial institutions, the contractor must provide evidence with each letter of credit it submits that the issuer has an acceptable rating. If a letter of credit exceeds $5 million, the contractor must obtain confirmation from a second institution with an acceptable rating.

A contractor must provide two letters of credit—one to guarantee completion of the project and one to ensure payment of subcontractors who provide materials and labor. The performance guarantee must extend through the construction warranty period and the payment guarantee must remain effective through the period within which subcontractors may bring suit for nonpayment.[9] If a letter of credit will expire within the latter period, the contractor must obtain a new letter at least thirty days before the original letter expires. If the contractor fails to obtain a new letter, the contracting officer may draw on the original letter. Significantly, the government need not notify the financial institution of the government's reasons for drawing on the letter of credit.[10]

Finally, letters of credit submitted in lieu of surety bonds are subject to the Uniform Customs and Practice (UCP) for Documentary Credits.[11] This publication governs the issuance of, and the right of a beneficiary to draw on, letters of credit. The government, however, recognizes an express exception to the UCP, concerning performance and payment letters of credit. Pursuant to this exception, it will hold an issuing bank liable for a letter of credit even if the letter expires during an interruption of the bank's business.[12]

Significant Bid Guarantee Cases

Recent General Accounting Office (GAO) bid protest decisions demonstrate that contracting officers and contract attorneys must review bid guarantees closely. Their scrutiny must extend beyond the actual guarantees to encompass all pertinent documents submitted with the guarantees.

A corporate surety must submit a power of attorney with its bond.[13] The contracting officer must ensure that the instrument indicates clearly that the surety has authorized its attorney-

---

[4] *See, e.g.*, Concord Analysis, Inc., B-239730.3 & B-241009, Dec. 4, 1990, 90-2 CPD ¶ 452.

[5] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.228-1, (1 Apr. 1984) (providing that offerors must submit a guarantee in the form of a "firm commitment," such as a bond, a postal money order, a certified or cashier's check, or an irrevocable letter of credit). Following the revision of the DFARS, the General Accounting Office opined in dicta that an offeror now may submit any type of separate bid guarantee the FAR will allow, including a certified check. *See* Halki Paint Contractors, Inc., B-244739, Nov. 18, 1991, 91-2 CPD ¶ 467. This new policy is sound and logical. A certified check, for example, affords the government immediate access to the funds that secure the contractor's bid.

[6] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL PROCUREMENT REG. § 1-10.204-2 (authorizing contractors to submit letters of credit in lieu of performance and payment bonds) (superceded 1 Apr. 1984).

[7] 56 Fed. Reg. 58,932 (1991). As a surety bond substitute, a letter of credit is a third-party contract for the benefit of the government. The contractor induces a bank to issue to the government a letter of credit in the amount the solicitation requires for a bond. The bank promises to pay this amount to the government on demand. *See* D.O.N. Protective Servs., B-244386.2, Jan. 6, 1992, 92-1 CPD ¶ 25.

[8] *See* DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 28.106-70 (1 Dec . 1984).

[9] *See* 40 U.S.C. § 270a (1988) (commonly known as the Miller Act).

[10] *But cf.* D.O.N. Protective Servs., B-244386.2, Jan. 6, 1992, 92-1 CPD ¶ 25 (finding bid responsive even though letter of credit for bid guarantee required government to notify bank that contractor was in default).

[11] INT'L CHAMBER OF COMMERCE, PUB. NO. 400, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (rev. ed. 1983).

[12] Under UCP article 19, "[b]anks assume no liability or responsibility for consequences arising out of the interruption of their businesses by Acts of God, riots, civil commotions, . . . or any other causes beyond their control." *Id.* art. 19. Upon resumption of business, a bank need not pay on or renegotiate a letter of credit that expired during a *bona fide* interruption of business. *Id.*

[13] *See* Bermu & Longo, S.A., B-246188, Oct. 30, 1991, 91-2 CPD ¶ 411.

in-fact to execute the bond. A bid bond is defective—and the bid it guarantees is nonresponsive—if the power of attorney is legally insufficient. In *Standard Roofing USA, Inc.*,[14] the protester claimed that the low bidder's power of attorney failed to establish the authority of the person who signed the bond. No actual signatures appeared on the instrument—only the typewritten names of the surety's corporate officers and a rubber-stamped signature of the corporate secretary. The agency denied the protest, arguing that the strict rules of suretyship apply only to bonds, not to the powers of attorney that accompany them. According to the agency, the instrument submitted with the bond was a legally sufficient, certified copy of a power of attorney. Although it was not an actual grant of authority, it was clear evidence that an original, executed power of attorney existed. On review, the GAO found no evidence that the surety had adopted the typewritten or stamped signatures as authentic and binding and concluded that the power of attorney essentially was unsigned. Strictly construing the power of attorney requirements, the GAO held that a copy of a power of attorney was not a legal substitute for an instrument that actually granted authority. Accordingly, it found that the contracting officer should have rejected the bid as nonresponsive because the enforceability of the bond was questionable.[15]

Given the relaxed bid guarantee requirements described above,[16] contractors probably will begin to submit irrevocable letters of credit with their bids. Two recent GAO decisions highlight the need to understand the nuances and special rules that govern these instruments.

If a letter of credit accompanying a bid limits the government's right to enforce the instrument against the issuer, the contracting officer must reject the bid.[17] In *D.O.N. Protective Services*,[18] the agency erroneously found a letter of credit unenforceable. The letter provided that the government could not draw on the letter unless the government first informed the issuer that the offeror was "in default under the terms and conditions of FAR part 28." The agency reasoned that it could not meet this condition because part 49 of the FAR—not part 28—governs default terminations. The GAO, however, held that the agency reasonably could have stated that the offeror was in default under FAR part 28. It concluded that the issuer's condition was not impermissibly restrictive of the government's rights.

In another case,[19] the government rejected a bid accompanied by a letter of credit that, by its terms, was subject to the UCP.[20] The offeror claimed that both the Federal Property Management Regulations[21] and the OFPP's new policy on letters of credit[22] authorized the use of this letter. The GAO agreed with the protester that the UCP is the norm for such instruments and that, in general, the UCP adequately preserves the government's remedies. In this case, however, the GAO found that the letter impermissibly restricted the government's right to recover from the issuer. The GAO pointed out that, because the instrument failed to disaffirm the language of UCP article 19,[23] the government probably could not have drawn on the letter if the letter had expired during an interruption of the bank's business. Accordingly, the GAO ruled that the agency properly rejected the bid as nonresponsive because enforceability of the letter was uncertain.

Conclusion

An attorney's advice about the legal sufficiency of letters of credit or the validity of a surety's power of attorney must be thorough and sound. Attorneys must review bid guarantees carefully to determine whether they are in the proper form and amount and to ensure that any instrument proffered as a guarantee does not restrict the government's right to recover if the awardee defaults before executing performance and payment bonds. Attorneys should remember that the validity of a guarantee must be clear on its face and that an offeror generally may not cure a defective instrument with extrinsic

---

[14] B-245776, Jan. 30, 1992, 92-1 CPD 127.

[15] *Id.*; *see also* Bermudez & Longo, S.A., B-246188, Oct. 30, 1991, 91-2 CPD ¶ 411; Prairie Land & Timber Co., B-245818, Sept. 27, 1991, 91-2 CPD ¶ 306; Environmental Management Servs., B-245508, Sept. 18, 1991, 91-2 CPD ¶ 261; Mars Elec. Inc., B-245192, Aug. 23, 1991, 91-2 CPD ¶ 195; Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111; Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87. In these cases, the GAO found bonds defective because the power of attorney was missing, the power of attorney identified as attorney-in-fact someone other than the person who actually signed the bond, or the contractor's certification that the power of attorney remained effective was unsigned. These cases confirm that a contracting activity must scrutinize all documents and must not presume a document's regularity.

[16] *See supra* notes 6-10 and accompanying text.

[17] *See* Waste Conversion, Inc., B-231524, Aug. 16, 1988, 88-2 CPD ¶ 151.

[18] B-244386.2, Jan. 6, 1992, 92-1 CPD ¶ 25.

[19] Niles Janitor Serv. & Supply, Inc., B-246575.3, Mar. 3, 1992, 92-1 CPD ¶ 256.

[20] *See generally* INT'L CHAMBER OF COMMERCE, *supra* note 11.

[21] 41 C.F.R. § 101-45.4805 (1991).

[22] *See supra* notes 6-10 and accompanying text.

[23] *See generally* INT'L CHAMBER OF COMMERCE, *supra* note 11, art. 19.

evidence after bid opening.[24] Familiarity with the laws of suretyship and letters of credit will enhance an attorney's ability to safeguard the rights of the government and to preserve the integrity of the competitive process. Major Helm.

Economic Waste Precludes Strict Compliance

For the first time, the Court of Appeals for the Federal Circuit has applied the doctrine of economic waste to prevent the government from demanding strict compliance in a construction contract. In *Granite Construction Co. v. United States*,[25] the contractor constructed a waterstop, at a cost of $5752, as part of a lock and dam construction project. Although the waterstop satisfied all contractual safety and performance requirements, it did not comply with all of the contract specifications. Consequently, the government ordered the contractor to remove and replace virtually all of the installed waterstop to comply with the specifications. The contractor proposed various alternatives to total removal and replacement, but the government refused to consider them. Instead, the government demanded strict compliance with the specifications, at a cost to the contractor exceeding $400,000. The contractor performed the additional work as ordered, then appealed to the Engineer Board of Contract Appeals. When the Board denied the appeal, the contractor took its case to the Federal Circuit. The court found for the contractor and remanded the case for consideration of quantum.

The Federal Circuit's decision is significant for contracting officers and their legal advisors. *Granite* requires the government to determine that a contractor's additional costs are justified by the additional value of the work to be performed before the government may order the contractor to correct noncompliant performance. If the added value will not justify the costs, *Granite* and the doctrine of economic waste bar the government from demanding strict compliance with the specifications unless the work, as performed, otherwise fails to satisfy the government's requirements. Furthermore, the case limits the government's remedies in the event of a contractor's noncompliant performance. If noncompliant performance otherwise satisfies the government's requirements, and if the value of the additional work will not justify the contractor's estimated costs, the government must accept the contractor's noncompliant performance—although the government may demand a downward equitable adjustment in the contract price.

Two additional points from *Granite* bear mentioning. First, the decision requires the government to consider a contractor's proposals. If the government rejects a proposal, it must be prepared to offer a reasonable explanation to justify that rejection. Second, *Granite* demonstrates the importance of the team approach in making contracting decisions. A contracting officer must do more than determine whether the contractor has met the specifications. He or she also must estimate the value of a project as built, the value of the project as planned, and the projected cost of modifying the project to eliminate noncompliant features. Lacking the expertise to make these determinations alone, the contracting officer will have to rely upon teams composed of technical experts, legal advisors, and financial analysts. Major Killham.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys (LAAs) of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Estate Planning Notes

Living Wills and LAAWS

The Living Wills portion of the Legal Automation Army-Wide System, Automated Legal Assistance Services Software (LAAWS-LA), version 4.0, has been updated. Living will forms for Florida, Illinois, Nebraska, Ohio, Rhode Island, South Dakota, and Wisconsin have been added. In addition, living will forms already loaded onto the program have been modified to reflect statutory changes in Arizona, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wyoming. Major Hancock.

Nonresident Personal Representatives[26]

Almost every legal assistance client uses his or her will to nominate a personal representative or executor to carry out the testamentary instructions in the will and to dispose of the client's property after the client dies. A client frequently will

---

[24] *See* Tri-Tech Int'l, Inc., B-244289, June 13, 1991, 91-1 CPD ¶ 569 (execution of performance and payment bonds after bid opening did not cure defect in bid guarantee); *cf.* Danish Arctic Contractors, B-225807, June 12, 1987, 87-1 CPD ¶ 590 (agency could use extrinsic evidence available to it before bid opening to confirm identity of attorney-in-fact, but not his authority).

[25] Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992).

[26] Colonel Raymond K. Costello, Deputy Chief Counsel, United States Army Armament, Munitions, and Chemical Command, provided information from which this note was prepared.

name his or her spouse as the primary executor or representative and a relative as an alternate. These nominees often will not be residents of the jurisdiction in which the client's will shall be probated.

State laws vary on whether nonresidents may serve as personal representatives. Twenty-four states[27] permit nonresidents to serve as personal representatives without imposing any special restrictions upon them. Fifteen states[28] and the District of Columbia permit a nonresident to serve as a personal representative if a resident agent is appointed to accept service of process on the estate. Five states[29] allow a nonresident personal representative if the testator or the estate appoints a resident corepresentative. In Georgia[30] and Illinois,[31] a nonresident must post bond to serve as a personal representative. Ohio[32] and Florida[33] permit a decedent's nonresident spouse or relative to serve as personal representative; however, Nevada[34] flatly prohibits any nonresident from serving in this capacity.

When counselling a client on the preparation of a will, an LAA should alert the client to state law provisions governing the appointment of a nonresident personal representative. This guidance should help to ensure that the client names an individual who can qualify as a personal representative under the applicable state law. Major Hancock.

Tax Note

Federal Income Tax Law Seminar

The Air Force Judge Advocate General School, Maxwell Air Force Base, Montgomery, Alabama, will hold its annual Federal Income Tax Law Seminar from 30 November to 4 December 1992. This course will provide judge advocates and civilian attorneys with basic information on federal tax law, estate planning, the tax implications of the Soldiers' and Sailors' Civil Relief Act,[35] and policies for administering a full-service installation tax program. This year, the Air Force has reserved twenty student quotas for Army participants on a first-come, first-served basis. To reserve a quota, write the Air Force Judge Advocate General School, CPD/JA, ATTN: FITLS, Maxwell Air Force Base, Alabama 36112-5712. Funding is the responsibility of the attendee's organization.

Family Law Note

Dividing a Veteran's Disability Pay upon Divorce

Retired service members who are at least moderately disabled are eligible to receive disability benefits from the Department of Veterans' Affairs (VA). To receive these benefits, a retiree must waive an equivalent amount of military retired pay.[36] Electing to receive VA benefits is an attractive option, however, because these benefits are not subject to income tax.[37]

The Uniformed Services Former Spouses' Protection Act (USFSPA)[38] permits states to divide "disposable retired pay"[39]

---

[27] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Kentucky, Maine, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, and Utah freely permit nonresidents to serve as personal representatives. *See* Pamela 0. Price & Tracy A. Borgert, *Is Florida's Personal Representative Statute Constitutional?*, FLA. B.J., Feb. 1992, at 31. West Virginia also permits a nonresident to serve as personal representative if he or she is nominated as executor in the will of a resident decedent. *See id.*

[28] Arkansas, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Missouri, North Carolina, Oklahoma, Rhode Island, South Dakota, Texas, Vermont, Washington, and Wisconsin permit a nonresident to serve as a personal representative if a resident agent is appointed to accept service of process. *See id.*

[29] Indiana, Michigan, New York, Virginia, and Wyoming permit a nonresident to serve as a personal representative if a resident corepresentative is appointed. *Id.*

[30] GA. CODE ANN. § 53-6-23 (Michie Supp. 1991).

[31] ILL. ANN. STAT. ch. 110, para. 6-13 (Smith-Hurd Supp. 1991).

[32] OHIO REV. CODE ANN. § 2109.21 (Page 1991).

[33] FLA. STAT. ANN. § 733.304 (West 1991).

[34] NEV. REV. STAT. ANN. § 139.010 (Michie 1986).

[35] *See* 50 U.S.C. app. §§ 501-591 (1988).

[36] *See* 38 U. S. C. § 3105 (1988).

[37] *See id.*

[38] Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982) (codified as amended in scattered sections of 10 U.S.C.).

[39] The USFSPA provides,

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—
>
> (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title[s] 5 or ... 38 [, U.S.C.];
>
> (C) in the case of a member entitled to retired pay under chapter 61 of this title [(10 U.S.C. §§ 1201-1221 (1988))], are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (D) are deducted because of an election under chapter 73 of this title [(10 U.S.C. §§ 1431-1454 (1988))] to provide an annuity to a spouse or former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (Supp. II 1990).

between a military retiree and the retiree's former spouse.[40] To avoid what they consider to be an unfair distribution of marital assets,[41] many states have treated VA disability pay as divisible marital property. In *Mansell v. Mansell*,[42] however, the Supreme Court found that this practice violates the USFSPA, holding that, "under the Act's plain and precise language[43], state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as marital property."[44]

Mansell ended the state courts' practice of openly dividing VA disability pay. This decision, however, has not settled the issue of how to divide the marital estate equitably when a military retiree is receiving this benefit.

In *Rose v. Rose*,[45] the Supreme Court held that federal anti-attachment provisions and similar restrictions governing VA disability benefits do not bar enforcement of state child support orders, even when a support obligor's only source of income is VA disability pay.[46] To date, courts in at least four states have interpreted *Rose* to hold that a court must consider the impact of VA disability pay on the relative financial situations of the parties to a divorce when it seeks to determine an appropriate property distribution or to calculate spousal support obligations.[47]

Although *Rose* suggests that these practices are permissible, an LAA representing a disabled retiree should beware of a court order that simply shifts from the retiree to the spouse an amount of property equivalent to the waived retirement pay. Such an order is open to attack because it effectively divides waived retired pay in direct contravention of *Mansell*. Major Connor.

Survivor Benefits

Designation of SGLI Beneficiaries

The proceeds of a Servicemen's Group Life Insurance (SGLI) policy often are the most valuable assets a service member can leave behind after dying. Accordingly, an LAA should encourage soldiers to consider their designations of SGLI beneficiaries carefully.

Clients should avoid designations "by law." Distribution of proceeds by law is determined by a federal statute[48] that assigns specific definitions and priorities to beneficiaries. A court will follow the federal distribution scheme to the letter, regardless of the equities in a particular case.

In general, a service member should designate each beneficiary by name. This general rule, however, may not apply if a soldier wants to ensure that the proceeds are used to care for minor beneficiaries. The SGLI office will pay proceeds designated for a person below the age of majority only to an adult custodian of the minor beneficiary bearing an official letter of guardianship issued by a competent court. Obtaining this letter may be expensive and time consuming.

---

[40] *See id.* § 1408(c)(1) ("a court may treat disposable retired . . . pay . . . either as property solely of the member or as property of the member and his [or her] spouse").

[41] The following example illustrates the effect of exempting VA disability pay from the definition of "disposable retired pay." Assume that a court orders a retiree to pay 50% of his military pension to his ex-spouse. The retiree's gross retired pay is $2000 per month. The retiree, however suffers from a moderate service-connected disability and is eligible to receive $361 each month in VA disability pay. Accordingly, he elects to receive the VA disability payment in lieu of an equal amount of retired pay. By doing so, he avoids paying taxes on the $361 and—as demonstrated below—distorts the equal property division that the court ordered.

Gross retired pay		$2000	
Less waived retired pay	-	($361)	
Disposable retired pay (DRP)	=	$1639	
	Retiree		*Ex-Spouse*
Even split of DRP	$819.50		$819.50
Less taxes (15% rate)	- ($122.77)		- ($122.77)
	= $695.73		= $695.73
Plus VA disability pay	+ $361.00		+ $ -o-
Net after taxes	$ 1,056.73		$ 695.73

[42] 490 U.S. 581 (1989).

[43] *See* 10 U.S.C. § 1408(c)(1) (1988).

[44] *Mansell*, 490 U.S. at 587.

[45] 481 U.S. 619 (1987).

[46] *Id.* at 634.

[47] *See* Clauson v. Clauson, 18 Fam. L. Rep. (BNA) 1347 (Alaska 1992); McMahon v. McMahon, 567 So. 2d 916 (Fla. Dist. Ct. App. 1990); Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989); Weberg v. Weberg, 463 N.W.2d 382 (Wis. Ct. App. 1990).

[48] 10 U.S.C. § 1970(a) (1988).

A service member can eliminate the need for judicial action by establishing a living trust for minor beneficiaries. The SGLI office recommends that a service member seeking to establish a trust should phrase his or her SGLI designation as follows: "Mr. John Doe, trustee under trust agreement dated _____."[49] Any other qualification of the designated beneficiary—that is, for example, "Mr. John Doe, guardian of _____" or "Mr. John Doe, trustee under my last will and testament"—might be considered testamentary. Distribution of SGLI proceeds then would be delayed while the SGLI office seeks judicial confirmation of the designee's guardianship or trustee status.

A service member who establishes a living trust should provide a copy of the trust agreement to the SGLI office. The SGLI office[50] will file the agreement with the service member's designation form. Major Peterson.

[49] Interview with Ms. Donna Stafford, Office of Serviceman's Group Life Insurance, Newark, New Jersey. Legal assistance attorneys with questions about SGLI may contact Ms. Stafford at (201) 802-3446.

[50] Service members wishing to mail documents to the SGLI Office should address them as follows:

Office of Serviceman's Group Life Insurance
213 Washington St.
Newark, New Jersey 07102

Claims Report

United States Army Claims Service

Claims Policy Note

Payment of Claims Tainted by Fraud

This claims policy note modifies the guidance found in paragraph 2-46c, Department of the Army Pamphlet 27-162.[1] *In accordance with paragraph 1-9f, Army Regulation 27-20,*[2] *this guidance is binding on all Army claims personnel.*

Department of the Army Pamphlet (DA Pam.) 27-162, paragraph 2-46c, presently provides that when claims personnel detect fraud on the part of a claimant before the government has paid the claim, they will deny each line item that is tainted by fraud. Other line items, if substantiated, must be adjudicated and paid.

In some cases, however, application of this policy yields unjust results. When claimants, or their agents, seek compensation for losses and damages under a gratuitous payment statute such as the Personnel Claims Act, they are obliged to submit accurate and truthful documentation to support their claims. To reflect this obligation more accurately, the claims policy of paragraph 2-46c is amended as follows:

Claims offices will continue to deny line items tainted by fraud. In addition, the head of an area claims office may completely deny a claim that is substantially tainted by fraud. *This authority may not be delegated further* and is independent of any other adverse action, judicial or administrative, which may be taken against a claimant submitting a fraudulent claim. Staff Judge Advocates are cautioned against applying this authority to reject claims because a claims adjudicator feels that "something is not right" about the claim or the claimant cannot produce complete substantiation for claims items. Staff Judge Advocates who use this authority to deny a claim will ensure that the claims files are properly documented to show the decision and reasons.

The term "substantially tainted by fraud" is not susceptible to complete definition; however, it normally would include a

[1] DEP'T OF ARMY, PAMPHLET 27-162, CLAIMS, para. 2-46c (15 Dec. 1989).

[2] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 1-9*f* (28 Feb. 1990).

claim submitted with altered estimates that falsely represent a significant portion of the claim, a claim for numerous missing items that the claimant clearly never owned, and a claim in which the claimant intentionally and substantially has misrepresented the ages or the conditions of numerous claimed items. Claims personnel are invited to discuss appropriate cases with the Personnel Claims and Recovery Division, United States Army Claims Service (USARCS), at DSN 923-3226/4240. Colonel Fowler.

Household Goods Recovery Note

Carrier Exception Sheets and NTS Storage

The government often will issue a "through government bill of lading" (TGBL), authorizing a carrier to pick up a soldier's household goods from a nontemporary storage (NTS) warehouse in which these goods have been stored pursuant to the Military Traffic Management Command Basic Ordering Agreement (BOA). The TGBL carrier then is liable for loss and damage as the "last handler" of the shipment, unless it can show that the items in question were lost or damaged before the carrier collected the shipment from the NTS warehouse. To prove that losses or damage occurred before pickup, the carrier's agents must prepare an exception sheet, or "rider," in accordance with paragraph 54*m* of the Personal Property Household Goods and Unaccompanied Baggage Tender of Service (Tender of Service).[3]

A carrier normally will hire a number of different agents to perform services on a shipment. On a pickup from NTS storage, it may hire even the NTS warehouse firm as an agent. When a carrier picks up an NTS shipment, the carrier's "primary hauling agent," or "hauler," takes items from the loading dock on which the NTS warehouse has placed them and loads them onto the truck. In some instances, a hauler will repack and reinventory a shipment. If the hauler notices losses or damages that are not reflected as preexisting damage on the inventory, it should prepare an exception sheet and should ensure that an employee of the NTS warehouse signs it. Normally, the hauler then will deliver the shipment or will place it in the carrier's storage-in-transit (SIT) warehouse closest to the shipment's destination. In the latter instance, a "delivery," or "destination," agent then would take the shipment from the SIT warehouse to the soldier's residence.

The carrier's "booking agent," whose name is listed in parentheses in block 1 of the TGBL, acts as the carrier's point of contact on the shipment. An "origin agent" normally packs up shipments at residences. Because shipments in NTS are already packed, a TGBL carrier picking up a shipment from an NTS warehouse often will list its booking agent as the "origin agent" on its internal documents, even though this company normally will not handle the shipment.

Carrier agents handling a shipment often prepare exception sheets against each other to ensure that the carrier will not hold them responsible for losses or damages after the Army recovers from the carrier. They prepare exception sheets against carrier SIT warehouse agents so frequently that riders between agents of a carrier commonly are referred to as "SIT riders." The carrier, of course, remains liable to the Army for any loss or damage that is presumed to have occurred while the shipment was in the custody of any of the carrier's agents and claims personnel should not mistake a "SIT rider" for an NTS rider.

A TGBL carrier is relieved of liability only for losses and damages listed specifically on the exception sheet that its agent prepares when it picks up the shipment from NTS. For example, a carrier that listed only "table leg broken" on the rider would be liable for damage to the table top. In particular, claims personnel should remember the following information:

- A carrier is liable for missing nuts, bolts, and other hardware needed to assemble furniture, unless the carrier indicates on the rider that the hardware is missing.[4] Paragraph 42*d* of the Tender of Service requires the packer to place hardware in a small bag and to attach this bag securely to the furniture from which the hardware is removed. If the bag is missing when the carrier picks up the furniture, the carrier must mention the absence of the bag on the rider.

- The carrier is liable for items missing out of cartons—including sealed cartons—unless it indicates on the rider that the items are missing.[5] As is true with any claim, if the item was missing from a carton in which it normally would not be packed—for example, when a fur coat allegedly is missing from a carton marked "linens"—the carrier is not liable unless the evidence indicates that the claimant actually owned the item and tendered it for shipment.

- The carrier is liable for mold and mildew damage to items unless the carrier records

[3] *See* DEP'T OF DEFENSE, DIRECTIVE 4500-34R, DEPARTMENT OF DEFENSE PERSONAL PROPERTY TRAFFIC MANAGEMENT REGULATION, app. A (Oct. 1991).

[4] *See In re* Stevens Worldwide Van Lines, Z-1348910-38-347, Dec. 17, 1991 (Gen. Accounting Office Claims Group).

[5] *See In re* Air Land Forwarders, Z-223409-68, Nov. 19, 1991 (Gen. Accounting Office Claims Group); *In re* Stevens Van Lines, Z-1348910(17), Feb. 19, 1991 (Gen. Accounting Office Claims Group).

this damage on the rider.[6] A general statement that items in the shipment were wet will not relieve the carrier of liability. Similarly, the carrier cannot escape liability simply by arguing that mold, mildew, or rust damage must have occurred while the shipment was in the NTS warehouse because the TGBL carrier had custody of the shipment only for a few weeks and the NTS warehouse had custody for years. To be relieved of liability, the TGBL carrier must inspect the items and must note exceptions at pickup.

- The carrier is liable for "concealed" damage to packed items, unless this damage is reflected on the rider.[7] Noting damage to the outside of a carton will not relieve the carrier of liability for damage to the carton's contents, unless the carrier opens the carton and records damage to these items on the exception sheet. If the carrier alleges after delivery that the NTS warehouse firm packed the items improperly, the carrier must prove that faulty packaging was the sole cause of damage.[8]

Paragraph 54*m* of the Tender of Service states that an exception sheet is invalid unless it is signed by an employee of the NTS warehouse firm.[9] Moreover, paragraph 54*m* now requires exception sheets to be dated. Claims personnel should consider invalid an undated rider on any shipment picked up from NTS after 31 May 1990. Paragraph 54*m* also requires both parties to sign an exception sheet; however, if the *TGBL carrier* (or its agent) has neglected to sign an exception sheet, the sheet is still valid if the carrier can produce it and the NTS warehouse does not dispute its validity.[10]

In practice, NTS warehouse employees occasionally do peculiar things. If an NTS warehouse employee initials an exception sheet, instead of signing it in the space provided, the rider is invalid unless the NTS warehouse acknowledges this mark as its agent's signature.[11] If the employee abbreviates the warehouse firm's name in an indecipherable manner or lists only its carrier's agent number, the exception sheet is valid, but USARCS personnel will inquire to ensure that this sheet actually is the rider the carrier's agent prepared when the agent picked up the shipment from NTS.

In some instances, a TGBL carrier will reinventory a shipment instead of preparing an exception sheet. If the TGBL carrier fails to cross-reference this new inventory to the original inventory, however, the new inventory is not an exception sheet within the meaning of paragraph 54*m* of the Tender of Service.[12]

In two instances, the Army will disregard a signed, arguably valid rider. First, the Army will disregard a "SIT rider." Because a SIT rider does not describe the condition of the shipment when the shipment was picked up from NTS, it cannot relieve the TGBL carrier of liability. Normally, the NTS warehouse firm's name will not appear on a SIT rider and the rider will be dated well after the pickup date listed on the TGBL. Occasionally, a TGBL carrier will hire the NTS warehouse firm to act as its hauler or its SIT agent. The Claims Service will disallow a rider signed by the NTS warehouse if significant discrepancies in dates and other evidence establish that this occurred.

The Army also will disregard a rider if the carrier and the NTS warehouse firm are subsidiaries of the same company, unless other evidence shows that the loss or damage occurred during NTS storage. A rider should be prepared at arm's-length between two parties trying to protect their own interests. Employees of two different companies typically will try to show that losses and damages occurred while the other party had custody of the shipment. Significantly, however, the BOA limits an NTS warehouse's liability to fifty dollars per line item. A TGBL carrier, on the other hand, is liable for $1.25 times the net weight of the entire shipment on a domestic Code 1 or Code 2 shipment. If both parties signing the exception sheet are employees of the same company, they have no incentive to ensure that the rider accurately reflects the condition of the shipment on pickup.[13] Rather, they may be tempted to minimize the company's total liability by assigning to the warehouse the blame for losses or damages.

Paragraph 3-21b(3)(c) of DA Pam. 27-162 requires field claims offices to forward *all* files involving a carrier and a warehouse firm to USARCS. Field claims personnel, how-

---

[6] *See In re* Interstate Int'l, Inc., Z-2727878(109), Jan. 10, 1989 (Gen. Accounting Office Claims Group).

[7] *See In re* Stevens Transp. Co., Z-1348910-26, Feb. 11, 1991 (Gen. Accounting Office Claims Group); *In re* Security Van Lines, Z-2854973-4, Nov. 4, 1991 (Gen. Accounting Office Claims Group).

[8] *See, e.g., In re* McNamara-Lunz Vans & Warehouses, 57 Comp. Gen. 415, 418 (Apr. 18, 1978).

[9] *Cf. In re* Trans-Country Van Lines, Z-2625150(2), June 4, 1980 (Gen. Accounting Office Claims Group).

[10] *See In re* Best Forwarders, Inc., B-240991, 1991 WL 156458 (Comp. Gen. Apr. 8, 1991).

[11] *See In re* Swift Int'l, Z-2849089(1), May 13, 1987 (Gen. Accounting Office Claims Group).

[12] *See In re* Air Land Forwarders Suddath, Inc., Z-223409(12), Sept. 25, 1987 (Gen. Accounting Office Claims Group).

[13] *See In re* A-1 Ace Moving and Storage, Inc., B-243477 (June 6, 1991) (unpub.).

ever, still must prepare demands on these claims. The more thoroughly claims personnel understand the exception sheet process, the easier they will find this task. Mr. Frezza.

Affirmative Claims Note

1991 Affirmative Claims Report

In calendar year 1991, Army claims offices collected over $9.8 million in medical-care recovery claims and $1.6 million in property-damage recovery claims. Although the total number of claims asserted and amounts recovered increased from calendar year 1990, medical-care claims recovery decreased slightly during this period.

The system that USARCS previously used to recognize offices for exceptional affirmative claims recovery was based solely on the amount each office collected. Unfortunately, this system denied smaller offices the opportunities to be recognized for their efforts. These offices, which generally have far smaller pools of potential recoveries to identify and assert than their larger counterparts, also should be recognized for their superior performances in recovering on the potential claims that are available to them.

To correct this problem, USARCS adopted a two-tiered affirmative claims recognition system. The offices that collect the largest amounts in medical-care recovery claims and in property-damage recovery claims will continue to be recognized. In addition, USARCS will recognize the offices that have shown the greatest improvement over a five-year period in their average annual collections on medical-care and property-damage recovery claims. The Claims Service hopes that this system will recognize offices more equitably and will provide all claims offices with greater incentive to pursue affirmative claims aggressively.

The Judge Advocate General has issued certificates of excellence to the following field claims offices:

Most Money Recovered for Affirmative Medical-Care Claims

1. 4th Infantry Division (Mechanized) and Fort Carson, Fort Carson, Colorado;
2. 1st Infantry Division (Mechanized) and Fort Riley, Fort Riley, Kansas;
3. III Corps and Fort Hood, Fort Hood, Texas;
4. Brooke Army Medical Center, San Antonio, Texas;
5. U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky.

Greatest Improvement in Medical-Care Claims Recovery Over a Five-Year Period[14]

1. Fort Leavenworth, Kansas;
2. U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia;
3. U.S. Army Transportation Center and Fort Eustis, Fort Eustis, Virginia;
4. Carlisle Barracks, Pennsylvania;
5. U.S. Army Pacific Command Claims Service, Fort Shafter, Hawaii;
6. Headquarters, U.S. Army, Japan.

Most Money Recovered for Affirmative Property-Damage Claims

1. U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma;
2. III Corps and Fort Hood, Fort Hood, Texas;
3. U.S. Army Missile Command, Redstone Arsenal, Alabama;
4. Fort Meade, Maryland;
5. U.S. Armed Forces Claims Service, Korea.

Greatest Improvement in Property-Damage Claims Recovery Over a Five-Year Period

1. Fort Huachuca, Arizona;
2. U.S. Army Field Artillery Center and Fort Sill;
3. U.S. Army Missile Command, Redstone Arsenal, Alabama;
4. Seneca Army Depot, Romulus, New York;
5. Headquarters, U.S. Army, Japan.

A number of other offices did extremely well and we commend them for their efforts. Although the Army's overall affirmative claims recovery was good in 1991, USARCS hopes to improve it in 1992. Captain Dillenseger.

Commander's Note

"I paid more for my goods than your system allows. I should be reimbursed for my full loss. I didn't know there was a limit. It's not fair."

[14]The Judge Advocate General awarded certificates to six offices in this category because two offices showed nearly identical levels of improvement.

Statements such as these from disgruntled claimants lead me to believe that we are not doing a very good job of educating our soldiers on the need for private insurance. We must do better.

Our personnel claims system was not designed to be a comprehensive insurance policy for our soldiers' personal effects. Rather, it is a morale system, authorized by Congress to help to compensate for the hardships of military life. The system clearly has limits and one of those limits is a declining annual appropriation. To ensure that the system may do the most good for the most people, we have placed limits on the amount that we will pay for many categories of items. For example, we will pay a maximum of $750 for a bicycle. Are we telling our soldiers that they should not own more expensive bicycles? Absolutely not. We are telling them, however, that if they choose to own more expensive bicycles, prudence would indicate that they should obtain private insurance for those bicycles.

Because so many claimants evince a lack of knowledge in this area, I encourage each claims office to publish periodic reminders in command information channels to encourage our soldiers to obtain adequate insurance coverage for their household goods and automobiles. We cannot pay full value for every lost, damaged, or destroyed item, but we can help our soldiers protect their financial interests. Colonel Fowler.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office and
TJAGSA Administrative and Civil Law Division

Innovations in Labor Law Practice

Alternative Dispute Resolution in Personnel Cases

Almost everyone complains about the time, expense, and agony involved in processing civilian personnel complaints and grievances. The administrative discrimination complaint process is unwieldy and time consuming. The whistleblower complaint process is worse. If not handled skillfully, a labor dispute can end in a deadlock. Justice delayed is justice denied—and even if the parties eventually resolve their dispute, the working relationship between employees may be disrupted so badly that no one is satisfied with the result.

Many labor specialists merely complain, but some have begun to do something about the situation. A growing number of federal agencies are experimenting with alternative dispute resolution (ADR). What is ADR? The term is as difficult to define precisely as "total quality management." A federal statute characterizes ADR as "any procedure that is used, in lieu of an adjudication as defined in [5 U.S.C. § 551(7)(1988)], to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration."[1] This staid definition, however, reveals only the range of alternatives available under ADR. It fails to capture ADR's philosophical commitment to resolving controversies in a manner that is timely, creative, and sensitive to the need of management and employees to maintain long-term relationships.

A manager may ask, "What benefit can I obtain from ADR that I could not obtain from existing appeals, grievance, and complaints procedures?" Agencies presently experimenting with ADR would answer that the manager will benefit from a timely process that is more sensitive to meeting agency needs, and less legalistic, than traditional approaches to dispute resolution. The agencies also might answer that ADR focuses more intently on promoting long-term interests than on producing short-term victories or defeats.

Alternative dispute resolution offers no magic solutions or instant answers to employee-management conflicts. Like total quality management, ADR emphasizes analysis of the true roots of a conflict, communication to explore the parties' common interests, and creativity in developing solutions.

Three current experiments in ADR demonstrate the benefits that this approach can provide. The first experiment—or, perhaps, series of experiments—involves the Department of Health and Human Services (DHHS) and the National Treasury Employees Union (NTEU). The DHHS had been overwhelmed with discrimination and labor complaints. To reduce its backlog, it combined its labor relations, employee relations and equal

[1] 5 U.S.C. § 581(3) (1988).

employment opportunity staffs under one office and set up a labor-management committee at a high level of management. It also proposed the adoption of a cooling-off period, during which the union would allow the management to try to resolve potential unfair-labor-practice complaints before filing these complaints with the Federal Labor Relations Authority (FLRA). The NTEU agreed to follow this procedure.

Finally, the NTEU and the DHHS worked out an innovative three-party agreement with the Federal Mediation and Conciliation Service (FMCS). In this agreement, the agency and the union essentially grafted a mediation step onto the existing three-step grievance process. Either the union or the management now may request FMCS mediation at any time before a third-step grievance decision is issued. The FMCS mediator works with the parties to develop a mutually acceptable solution. If, after thirty days, labor and management have not resolved their dispute, the union may resort to traditional grievance procedures—up to, and including, arbitration and litigation. Each party (the NTEU, the DHHS, and the FMCS) must pay only its own costs for the mediation. Consequently, the DHHS and the NTEU incur almost no expenses if they attempt mediation. To date, the FMCS has resolved four of ten DHHS-NTEU cases successfully.

Another federal agency experimenting with ADR is the Library of Congress. Like the DHHS, the Library of Congress suffered from a backlog of discrimination complaints. A joint team of labor and management representatives developed a pilot program to address the complaints. As part of this pilot program, the Library of Congress established a mediation office, which it staffed with trained personnel. Under the informal dispute resolution process, the parties assign discrimination complaints and other labor disputes to a mediator. After gathering information, the mediator helps the parties to resolve the dispute. If mediation fails, the mediator convenes a panel of two management representatives and two labor representatives. This panel hears each side of the dispute for thirty minutes, then develops a draft resolution. The panel presents the resolution to the disputant, who may accept or reject the resolution. If the disputant accepts the resolution, the matter is settled. If the disputant rejects it, the panel informs the employee that he or she may pursue statutory rights of appeal through the Merit Systems Protection Board (MSPB or Board), formal Equal Employment Opportunity Commission (EEOC) procedures, a labor agreement, a classification appeal, or other existing procedures. The informal ADR process is designed to be completed within fifty days.

The Library of Congress also is experimenting with a formal dispute resolution process. Under this process, the agency will forward a discrimination complaint or grievance to a hearing examiner or an arbitrator, who will hear the case and issue a decision within seventy days of the filing of the complaint or the grievance. During the pilot program, the Library of Congress will accept the decision of a hearing examiner or an arbitrator as a final agency decision. An unsatisfied disputant may appeal this decision to a federal district court or to the FLRA.

The General Accounting Office (GAO) presently is experimenting with a third ADR program. The GAO—which must deal with employee groups, rather than formal unions—has appointed and trained thirty-two senior officials to act as neutral mediators in employee disputes. These mediators can hear all kinds of cases, including discrimination complaints, employee grievances, and personality conflicts. The disputant must decide voluntarily whether to elect mediation. If mediation fails, the disputant may seek redress through existing administrative or statutory complaint, grievance, or appeals procedures. The GAO apparently has found this mediation process very successful, not only in resolving employee complaints at the lowest possible level, but also in educating senior officials about dispute resolution techniques.

These experiments share several common themes. First, in each case, all of the stakeholders (labor, management, and employees) have participated in the development of the ADR process. Second, each agency designed its ADR procedures to resolve disputes rapidly and to involve senior management or neutral mediators early in the proceedings. Third, in each case, an unsatisfied disputant may continue to seek redress through existing administrative and statutory processes. Fourth, the ADR systems have resolved a significant number of the disputes referred to ADR. Finally, ADR seems to promote more "user satisfaction" than traditional approaches to dispute resolution.

Federal law now requires all agencies to implement ADR programs and to examine alternative means of resolving disputes that pertain to agency actions. Senior Army attorneys, in conjunction with the Office of the General Counsel of the Army, are developing training programs and initiatives to encourage use of ADR. Even so, an individual Army attorney or manager who has had to deal with a backlog of cases or a particularly corrosive working environment may be able to suggest better ways to do business. Ms. Buchanan, Attorney-Advisor, General Law Division, Army Materiel Command.

EVADED—A New ADR Technique

The Deputy Chief of Staff for Personnel for the United States Army Depot System Command (DESCOM) recently concluded a two-year test of an ADR mechanism called "EVADED."[2] Under this program, an employee facing a disciplinary action admits that he or she has committed a minor offense and agrees to improve his or her conduct. In return, the management promises not to suspend the employee. The United States Army Concepts Analysis Agency currently is studying EVADED for possible implementation throughout the Department of the Army.

[2]The acronym, "EVADED," stands for Elected Voluntary Alternate DESCOM Discipline.

The benefits of the program are many. The agency profits because EVADED increases worker productivity by eliminating the time each employee facing disciplinary action must spend off the job and reduces the number of employee appeals. The employees also benefit. An employee disciplined under EVADED continues to work and, therefore, loses no pay. Most employees also feel that EVADED gives them greater control over the decision-making process than traditional disciplinary actions. Finally, because the process is less public than traditional disciplinary actions, it is less humiliating to employees.

Currently, DESCOM will offer to use EVADED to resolve a disciplinary action for attendance-related conduct violations for which the agency otherwise would suspend an employee without pay. Occasionally, the agency will use EVADED for offenses unrelated to unauthorized absences. Once DESCOM offers EVADED for a specific offense, however, it must offer the program to employees in all similar, subsequent cases. Failure to do so could permit an employee to challenge a disciplinary action on grounds of disparate treatment. Moreover, the agency meticulously must explain in the decision letter why it declined to use EVADED for an offense that the agency ordinarily would process under that program. The decision letter must contain a discussion similar to the justification a deciding official must provide when he or she exceeds the standard table of penalties in an ordinary disciplinary action.

Significantly, EVADED is not appropriate for offenses when actual loss of pay is required by law—for example, when the agency must punish an employee for misusing a government vehicle. Similarly, DESCOM may not use EVADED when removal is the appropriate penalty or when the charge includes multiple offenses—for example, when an employee is accused of both absence without leave and insubordination.

The procedures for an EVADED action resemble those of any other attendance-related disciplinary action. The burden of proof and the evidentiary standards remain the same. If the supervisor and the management-employee relations (MER) representative decide that the action is supportable, the supervisor, the MER representative, the employee, and—if appropriate—the employee's representative, meet to discuss the case. The management then offers to use EVADED to resolve the disciplinary action. If the employee accepts EVADED, the MER representative and the employee complete the EVADED agreement and the agency places the agreement in the employee's official personnel file. If the employee rejects EVADED, the agency proposes formal discipline and the normal disciplinary process ensues.

The EVADED form is a simple, one-page document. The first paragraph contains the employee's voluntary election to accept corrective disciplinary action. The second paragraph is a fill-in-the-blank description of the offense. In the third paragraph, the employee admits to the misconduct. The employee also acknowledges that management could have imposed a suspension without pay, stating the duration of the suspension he or she would have received had he or she not elected to accept punishment under EVADED. The employee agrees that the agency may consider the action the employee's first—or higher, if applicable—offense under the standard table of penalties and concedes that the management may use this action to deal more harshly with future misconduct in accordance with the concept of progressive discipline. The employee recognizes that the EVADED form will become part of the MER office file and his or her official personnel folder and that the management may use this document in subsequent disciplinary actions against the employee to punish new offenses.

The employee also acknowledges that his or her election to participate in the EVADED program is voluntary, declaring that he or she fully agrees with the terms of the program. The employee must state that he or she understands that by electing to participate in the program, he or she waives the appeal and grievance rights that the employee otherwise could have exercised.

The employee must commit to self-improvement, describing in detail the ways in which he or she will improve his or her future conduct. Finally, the employee, the employee's supervisor, a witness, and the employee's representative all must sign the agreement.

The EVADED program may be used successively or in combination with traditional actions as one step in a pattern of progressive discipline. In *Kelley v. Department of the Army*,[3] an administrative judge (AJ) affirmed an employee's removal, holding that the agency properly considered the employee's participation in EVADED to be an element of his past disciplinary record. To date, however, no judicial decision has addressed this issue directly.

Implementation and impact bargaining is necessary to implement EVADED. Federal employees' unions initially were suspicious of the program because it requires a waiver of appeal rights. Managers also were suspicious because they did not believe that an employee could be rehabilitated without an actual suspension.

Approximately seventy-five percent of the employees offered EVADED have elected to proceed under that program. In 1990, employees selected EVADED in 109 of 144 possible actions. Had DESCOM not offered EVADED as an alternative to existing disciplinary procedures, it might have had to suspend employees without pay for 916 days in 1990. By participating in EVADED, employees avoided 724 days of unpaid suspensions that year. In 1991, employees chose EVADED in seventy-nine of the 107 cases in which the program was

[3]No. DA07529110237 (May 7, 1991).

offered. Of 738 potential days of suspension without pay, employees received only 122.

Given the simplicity and the uniformity of its documentation, EVADED looks very different from traditional disciplinary practices. In many ways, however, it actually is similar to certain accepted practices. In particular, EVADED closely resembles a "last-chance" settlement agreement, differing only in two important respects. In a last-chance agreement, the employee waives not only the right to appeal the current action, but also the right to appeal the penalty administered in a future adverse action if the employee commits a second specified offense.[4] In an EVADED agreement, the individual waives only the right to appeal the current offense. Moreover, an employee cannot break an EVADED agreement. Management will treat any violation of the agreement as a separate offense. Accordingly, the agreement does not require the employee to waive his or her rights in any future action.

Although DESCOM has completed the initial test phase of the EVADED program, the Army has not analyzed EVADED's success fully. The Concepts Analysis Agency will conduct a complete study of the program, investigating the program's impacts on recidivism rates, employee productivity, employee acceptance, and management workload. Ms. DuCharme, Labor Counselor, United States Army Depot System Command.

Equal Employment Opportunity Notes

Supreme Court: Back Pay Is Taxable Income

In *United States v. Burke*,[5] the Supreme Court held that back pay awards in settlement of claims filed under Title VII of the 1964 Civil Rights Act[6] are not excludable from gross income under section 104 of the Internal Revenue Code.[7] In *Burke*, the Tennessee Valley Authority (TVA) withheld federal income taxes from the amounts it paid to the plaintiff-employees in an equal-pay class action suit. The employees filed for a refund of the taxes that the TVA withheld, claiming that these monies should have been excluded from their gross incomes as "damages received on account of personal injuries." The trial court disagreed, ruling that, because the employees had received only back wages—rather than compensatory or other damages—the settlement proceeds could not be excluded from their gross incomes. The Court of Appeals for the Sixth Circuit reversed. It concluded that the proper exclusion of an award from the recipient's gross income turns on the nature of the injury and on whether the claim is "personal and tort-like in nature."[8]

In a seven-to-two vote, the Supreme Court reversed the Sixth Circuit. The Court noted that Congress's purpose in enacting Title VII was to make an employee whole by restoring his or her lost wages. It reasoned that because wages are taxable, settlements or awards of back pay likewise must be taxable. Justices Thomas and O'Connor dissented.

In reviewing *Burke*, attorneys should remember that this decision primarily effects cases arising before Congress enacted the Civil Rights Act of 1991.[9] The 1991 act extended congressional sanction to compensatory damages in Title VII or handicap discrimination litigation.[10]

Rehabilitation Act Will Not Protect an Alcoholic Employee from Discharge for Serious Misconduct

Earlier this year, the United States District Court for the District of Columbia held that the Rehabilitation Act of 1973[11] did not protect an alcoholic employee whose serious misconduct disqualified him from federal service. In *Wilber v. Brady*,[12] the court considered the discharge of a Treasury Department employee removed for driving while intoxicated and for causing an accident that resulted in the death of a two-year-old child.

The plaintiff, a criminal investigator with the Bureau of Alcohol, Tobacco, and Firearms (BATF), drove in a government-owned vehicle (GOV) to a bar after work. After leaving the bar, the plaintiff collided with another vehicle while driving in the wrong direction on an interstate highway. The

---

[4] *See* McCall v. United States Postal Serv., 839 F.2d 664 (Fed. Cir. 1988) (upholding agency's use of last-chance settlement agreements).

[5] 112 S. Ct. 1867 (1992).

[6] *See* 5 U.S.C. § 5596 (1988). *See generally* 42 U.S.C.A. §§ 2000e-1 to 2000e-16 (West 1981 & Supp. 1992).

[7] *See* I.R.C. § 104(a)(2) (West Supp. 1992).

[8] 929 F.2d 1119, 1121 (6th Cir. 1991).

[9] Pub. L. No. 102-166, 105 Stat. 1071.

[10] *Id.* § 102, 105 Stat. at 1072-73. *See generally* Michael J. Davidson, *The Civil Rights Act of 1991*, ARMY LAW., Mar. 1992, at 3, 3-4.

[11] Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

[12] 780 F. Supp. 837 (D.D.C. 1992).

child, a passenger in the other car, died in the accident. The plaintiff later pleaded guilty to charges of vehicular homicide and driving under the influence of alcohol. The agency then removed plaintiff for misuse of a GOV, conduct prejudicial to the government, and revocation of his driver's license.

The plaintiff appealed the removal decision and an MSPB AJ mitigated the removal to a thirty-day suspension. The BATF petitioned the MSPB for review *en banc*. The Board agreed. On review, it sustained the plaintiff's removal.[13] The plaintiff then appealed to the EEOC, but the Commission affirmed the final MSPB decision.

Finally, the plaintiff filed an action in federal district court. Seeking to claim the protection of the Rehabilitation Act, he contended that, as an alcoholic, he was an "otherwise qualified handicapped" individual and that the agency wrongfully failed to retain him with a reasonable accommodation for his handicap.

The agency responded that the plaintiff was not "otherwise qualified," emphasizing that the plaintiff's misconduct disqualified him from continuing his employment with the BATF. To support this argument, the Department of the Treasury relied heavily on *Hougens v. United States Postal Service*.[14] In *Hougens*, the MSPB held that certain acts of misconduct remove an employee from the scope of the protecting legislation.[15] The Board opined that a handicapped employee is "otherwise qualified" only if, despite his or her handicap, he or she is technically, physically, mentally, emotionally, and morally fit to perform the duties of his or her position. If the agency proves that an appellant's misconduct, standing alone, disqualified the appellant for his or her position because it impacted on one of these elements of performance, the Board will sustain the appellant's removal, even if the agency neglected to provide the appellant with an opportunity for rehabilitation.[16]

The *Wilber* court concluded that the Rehabilitation Act does not prohibit an employer from discharging an employee when the basis for the removal is the employee's misconduct, rather than a handicap to which the misconduct may be related. The court remarked that it could draw no other conclusion from the plain language of the statute.

Wilber demonstrates that, although a handicap discrimination claim may create difficult issues in an otherwise "simple" disciplinary action, a handicapped employee may not use the Rehabilitation Act as an impenetrable shield to forestall punishment for on- or off-duty misconduct. An agency attorney should consider whether the employee, in committing the misconduct, removed himself or herself from the "otherwise qualifying handicap" definition. When appropriate, an attorney should cite *Wilber* and *Hougens* as authority that an employee should not be permitted to escape the reasonable consequences of his or her misdeeds by relying on his or her inability to control an addiction.

Cancellation of Personnel Action—An Interim Relief Land Mine

In *Moorer v. Department of Defense*,[17] the MSPB dismissed an employee's "Motion to Compel Interim Relief," finding no authority to justify such a motion.[18] More important to labor practitioners, the Board also dismissed as moot the agency's petition for review.[19] Instead of following the requirements of the MSPB's interim relief order to reinstate the employee provisionally, the agency mistakenly had cancelled the personnel actions in question, unwittingly obviating its own petition for review.[20]

Moorer is not an isolated decision. In *McElrath v. Department of Veterans' Affairs*,[21] the MSPB dismissed an agency's petition for review after the agency retroactively canceled the appellant's demotion.[22]

Incorrect Mixed-Case Appeal Advice Tolls Time Limitation for Filing Suit

A recent judicial decision underscored the importance of correct appellate advice at an administrative level. An agency accurately must advise a complainant of the steps he or she

---

[13] Wilber v. Department of the Treasury, 42 M.S.P.R. 582 (1989).

[14] 38 M.S.P.R. 135 (1988).

[15] The Postal Service demoted Hougens after he pointed and fired a pistol at four unarmed men in a bar. *Id.* at 139. The MSPB upheld Hougens' demotion despite his claim of handicap discrimination based on his alcoholism. *Id.* at 150-51.

[16] *Id.* at 143.

[17] 53 M.S.P.R. 581 (1992).

[18] *Id.* at 583.

[19] *Id.* at 584.

[20] *Id.* at 583-84.

[21] 53 M.S.P.R. 569 (1992).

[22] *Id.* at 571.

must take to exercise an appellate right if the agency wishes to preclude possible judicial review of the discrimination complaint months—or even years—after the complaint's administrative disposition.

The forum in which a federal employee may seek review of the final MSPB decision in an adverse employment action will depend on whether the employee raised allegations of unlawful discrimination in his or her initial MSPB appeal. If the employee has not alleged that the appealed employment action was motivated by unlawful discrimination, the employee may seek review of the final decision only before the United States Court of Appeals for the Federal Circuit.[23] On the other hand, if the employee has alleged that the adverse employment action was motivated by unlawful discrimination—presenting what commonly is called a mixed-case complaint—the proper forum for judicial review is a federal district court.[24]

Pursuant to federal law, a plaintiff must file a mixed-case complaint in district court "within [thirty] days after the date the individual filing the case received notice of the judicially reviewable action."[25] In *Lee v. Sullivan*,[26] the District Court for the Northern District of California held that this thirty-day filing requirement does not begin to run until the complainant receives correct notice of his or her right to sue. In *Lee*, the agency mistakenly advised the complainant to pursue her mixed-case appeal in circuit court. Because the agency never corrected this error, the district court held that the filing requirement had been tolled indefinitely.

To ensure administrative and judicial finality, a labor counselor must ascertain whether a complainant has received accurate appellate advice. If the agency has advised the complainant erroneously, the administrative case should be reopened to ensure that the agency correctly notifies the complainant of his or her appellate rights and obligations.[27]

Labor counselors can learn from the old adage, "It ain't over 'til it's over." They should review decisions from third party adjudicators for procedural errors on appellate advice even when these decisions favor the complainant.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your equal employment opportunity officer.

---

[23] 5 U.S.C. § 7703(b)(1) (1988).

[24] *Id.* § 7703(b)(2).

[25] *Id.*

[26] 787 F. Supp. 921 (N.D. Cal. 1992).

[27] *See* Protiva v. Department of the Interior, 53 M.S.P.R. 178 (1992) (table disposition), *complete opinion reprinted in* 92 Fed. Merit Sys. Rep. (LRP) 5186 (Mar. 12, 1992).

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following case summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers[1] to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion. To stress education and to protect privacy, neither the identities of the offices, nor the names of the subjects will be published. Mr. Eveland.

---

[1] DEP'T OF ARMY, PAM. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA Pam. 27-26].

Case Summaries

Army Rule 1.8 (Conflict of Interest: Prohibited Transactions)
Army Rule 1.9 (Former Client)
Army Rule 1.11 (Successive Government and Private Employment)
Army Rule 3.8 (Special Responsibilities of a Trial Counsel)

A well-intentioned civilian attorney, who previously served as an Army trial counsel, violated ethical and statutory conflict of interest prohibitions against switching sides when he represented an innocent veteran against whom he earlier had obtained an erroneous conviction.

In 1976, an Army trial counsel (TC) successfully prosecuted a soldier charged with premeditated murder. The soldier received a life sentence. In 1977, the Army Court of Military Review ordered a new trial because a key witness against the soldier had confessed to committing the murder. In 1978, the TC, thoroughly convinced of the soldier's innocence, devoted himself to coordinating deferment of the soldier's confinement at Fort Leavenworth while the convening authority dismissed all charges against the soldier.

Both the innocent soldier and the TC left the Army. Years later, when the innocent veteran could find no one who could help him obtain a certificate of innocence,[2] he turned to the former TC. The veteran informed the attorney that he wanted to clear his name, but did not intend to seek monetary damages from the government. The attorney agreed to represent the veteran *pro bono*.

The attorney appeared before the Army Court of Military Review to file a petition for a certificate of innocence. The Army court responded by ordering the attorney to show cause why he should not be required to withdraw his appearance. It noted pointedly that 18 U.S.C. § 207 (1988)[3] forbids an individual who participated in a particular matter while employed by the government from switching sides and representing another party in the same matter.[4]

Stating that he had not been aware of the statute's prohibitions, the attorney moved to withdraw the veteran's petition. He also reminded that court that he freely had revealed his role in the veteran's court-martial, emphasized that he had taken the veteran's case *pro bono*, and defended his representation of the veteran as an action taken in the name of justice.

The Army court dismissed the petition, then asked the Executive, Office of The Judge Advocate General (OTJAG), to determine whether the attorney had violated 18 U.S.C. § 207 or any Army ethical rules. The attorney asked the Executive whether the attorney could let the veteran review his trial notes from the 1976 court-martial.

After studying the petition and allied papers, attorneys at OTJAG decided that the former TC had violated section 207. They concluded, however, that because the attorney had accepted the case *pro bono*, the Army did not have to notify the Department of Justice (DOJ) or the Office of Government Ethics (OGE) of the attorney's violation of the statute.[5]

The investigating attorneys also found that the former TC had committed several ethical violations. In particular, they noted that the attorney (1) had used information relating to his representation of a client to the client's disadvantage without first obtaining the client's informed consent;[6] (2) had failed to obtain a former client's consent before representing another

---

[2] A person who sues the United States to recover damages for unjust conviction and imprisonment must prove that he or she "did not commit any of the acts [with which he or she was] charged or [that] his [or her] acts . . . in connection with such charge constituted no offense . . . and that he [or she] did not by misconduct or neglect bring about [the wrongful] prosecution." 28 U.S.C. § 2513 (1988); *cf. id.* § 1495 (empowering the Court of Claims "to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned"). A plaintiff can satisfy this burden of proof only by showing that the court that overturned his or her conviction has certified the "requisite facts" set forth in section 2513(a). *See id.* § 2513(b); *see also* Forrest v. United States, 3 M.J. 173 (C.M.A. 1977) (only the truly innocent may be accorded relief).

[3] 18 U.S.C. § 207(a)(1) (1988). *See generally*, Annotation, *Limitation, Under 18 USCS § 207, on Participation of Former Federal Government Officers and Employees in Proceedings Involving Federal Government*, 71 A.L.R. FED. 360 (1985).

[4] *But see, e.g.*, U.S. Office of Gov't Ethics, *Informal Advisory Letter 86X13 in* THE INFORMAL ADVISORY LETTERS AND MEMORANDA AND FORMAL OPINIONS OF THE UNITED STATES OFFICE OF GOVERNMENT ETHICS (1989) (an individual's work as a government employee on a request for proposals was not the "same particular matter" as a bid he entered as a private party after leaving government service).

A former military defense counsel may participate as retained civilian counsel without violating 18 U.S.C. § 207. JAGA 1970/4815, 25 Mar. 1971, *as digested in* 71-6, Judge Advocate Legal Service 9. Reversible error exists, based on deprivation of an accused's statutory right to choose civilian counsel, if a trial defense counsel is not allowed to continue to represent an accused immediately after the counsel's separation from military. United States v. Andrews, 44 C.M.R. 219 (C.M.A. 1972).

[5] DEP'T OF ARMY, REG. 600-50, PERSONNEL—GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL, para. 5-4*b* (28 Jan. 1988) [hereinafter AR 600-50] (delegating to The Judge Advocate General (TJAG) the general authority to conduct administrative enforcement functions for violations of 18 U.S.C. § 207 (1988)). Paragraph 5-4e of AR 600-50 provides, "On receipt of information regarding a possible violation of 18 USC 207 [sic]... and after determining that the information appears substantiated, TJAG . . . will provide such information to the Army General Counsel [who will] forward it to the Director, OGE, and to the Criminal Division, DOJ."

[6] DA PAM. 27-26, *supra* note 1, rule 1.8.

client in a substantially related matter;[7] (3) had used information relating to his representation of a former client to the disadvantage of the former client;[8] and (4) had represented a private client in connection with a matter in which he previously had participated personally as a public officer.[9] They also found that the former TC violated Army Regulation (AR) 600-50, which permanently prohibits a former officer from representing any party by "appear[ing] before or . . . communicat[ing] with the [g]overnment in connection with any matter involving specific parties" in which the officer participated personally and substantially on the government's behalf.[10] The investigators, however, suggested that the attorney's obvious good intentions mitigated his ethical violations.[11]

The investigators decided without hesitation that the former TC could share with the veteran the trial notes and other work product that the attorney compiled during the 1976 court-martial. They noted that a TC is not only an advocate, but also an officer of the court, charged with ensuring that justice is done. Significantly, Army Rule of Professional Conduct 3.8 requires a TC to disclose promptly to the defense any evidence or information of which he or she is aware that tends to negate the guilt of the accused. Moreover, 18 U.S.C. § 207(h) specifically authorizes a former government official to testify and make statements. In the instant case, the investigators concluded that the federal statute barred the attorney only from representing the innocent veteran.

The Executive, OTJAG, advised the attorney to stop representing the veteran in proceedings arising from the veteran's court-martial conviction, warning the attorney that this representation violated 18 U.S.C. § 207, AR 600-50, and Army Rule of Professional Conduct 1.11. The Executive also authorized the attorney to share work product notes and testimony with the innocent veteran. Mr. Eveland.

Army Rule 3.4
(Fairness to Opposing Party and Counsel)
Army Rule 3.8
(Special Responsibilities of a Trial Counsel)
Army Rule 8.4
(Misconduct)

An Army TC who isolated rebuttal witnesses and directed them not to discuss their testimonies with the defense made a judgmental error in trial strategy, but did not commit an ethical violation.

At an officer's court-martial for larceny and forgery, the military judge ruled that the TC committed an ethical violation by instructing two fingerprint experts who were to testify as rebuttal witnesses to conceal themselves from the defense and to avoid disclosing their conclusions to the defense counsel. The judge opined that the TC actually did not intend to suppress evidence, but wanted simply to delay the disclosure of that evidence until a reciprocal discovery rule was triggered. Nevertheless, the judge concluded that the TC had acted improperly, observing that the subjective nature of certain expert analyses prompts heightened Sixth Amendment concerns.[12]

The TC agreed not to call the two expert witnesses on rebuttal. Accordingly, when the accused appealed his convictions, the Army Court of Military Review declined to dismiss the charges for prosecutorial misconduct, holding that the accused had suffered no material prejudice. The convicted officer then complained to OTJAG. In response, OTJAG asked the TC's supervisory judge advocate (JA) to appoint a preliminary screening official (PSO) to inquire into the ethical aspects of the case.

The PSO first concluded that, because the defense had filed no formal discovery request, the Government had not been obliged to disclose the reports of the two fingerprint experts. After considering the TC's analysis of his actions, the PSO disputed the ruling of the military judge. Concluding that the TC had intended only to force mutual discovery, the PSO found that the TC had committed no ethical violations.

The PSO, however, advised the supervisory JA to warn the attorneys in the TC's military justice office not to rely automatically on technical discovery rules. He remarked that such reliance can create the appearance of ethical impropriety, as well as unnecessary gamesmanship, pretrial motions, and delays. The Army Rules of Professional Conduct prohibit a lawyer from unlawfully obstructing another party's access to evidence[13] or engaging in conduct that seriously interferes with the administration of justice.[14] Prosecutors, in particular, have a special duty to disclose evidence. A TC must ensure that an

---

[7] *Id.*, rule 1.9.

[8] *Id.*

[9] *Id.*, rule 1.11.

[10] *See* AR 600-50, *supra* note 5, para. 5-3*b*(1)(a).

[11] Whether discipline should be imposed for an ethical violation depends on all the surrounding circumstances, including the willfulness and seriousness of the violation and any extenuating factors. *See* DA PAM. 26-27, *supra* note 1, scope, at 2.

[12] United States v. Broadnax, 23 M.J. 389, 393 (C.M.A. 1987).

[13] DA PAM. 27-26, *supra* note 1, rule 3.4.

[14] *Id.*, rule 8.4.

accused receives procedural justice[15] and must comply in good faith with discovery procedures.[16]

The supervisory JA agreed with the PSO's findings. Like the PSO, he concluded that the TC had committed no ethical violations.

Satisfied that the problem was judgmental, rather than ethical, the Assistant Judge Advocate General for Military Law (AJAG/ML) closed the case with a letter reminding the TC's staff judge advocate (SJA) that, although the Government had acted in good faith in the instant case, hiding witnesses and instructing them not to discuss their potential testimonies with the defense counsel were actions that were bound to raise ethical and appellate issues.[17] Accordingly, the AJAG/ML asked the SJA to ensure that his counsel fully understood the importance of analyzing ethical and appellate considerations when selecting trial tactics. Mr. Eveland.

[15] *Id.*, rule 3.8.

[16] STANDARDS FOR CRIMINAL JUSTICE § 3.11 (Am. Bar Ass'n 2d ed. 1980).

[17] *See* Brady v. Maryland, 373 U.S. 83 (1963).

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Reserve Component Quotas for Resident Graduate Course

The Commandant, The Judge Advocate General's School, has announced that two student quotas in the 42d Judge Advocate Officer Graduate Course have been set aside for Reserve Component judge advocates. The forty-two-week, graduate-level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 2 August 1993 to 13 May 1994. Successful graduates will be awarded the degree of Master of Laws in Military Law. Any Reserve Component Judge Advocate General's Corps (JAGC) captain or major who will have at least four years of JAGC experience by 2 August 1993 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may *not* apply to attend the resident course. Each application packet must include the following materials:

1. Personal data: The applicant's full name (including the applicant's preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

2. Military experience: A chronological list of the applicant's Reserve Component and active duty assignments.

3. Awards and decorations: A list of the applicant's awards and decorations.

4. Military and civilian education: A list of the schools the applicant has attended and the degrees the applicant has obtained, along with dates of completion for each course of instruction and any honors the applicant has received. The applicant also must include his or her law school transcript.

5. Civilian experience: The applicant should include a resume describing his or her legal experience.

6. Statement of purpose: In one or two paragraphs, the applicant should state why he or she wants to attend the resident graduate course.

7. Letter of recommendation:

a. If the applicant is assigned to a United States Army Reserve (USAR) Troop Program Unit, he or she should include a letter of recommendation from his or her military law center commander or staff judge advocate.

b. If the applicant is a member of the Army National Guard (ARNG) he or she should include a letter of recommendation from his or her staff judge advocate.

c. If the applicant is a USAR individual mobilization augmentee (IMA), he or she should include a letter of recommendation from his or her staff judge advocate or proponent office.

8. Department of Army Form 1058 (for USAR applicants) or National Guard Bureau Form 64 (for ARNG applicants): The applicant must fill out the appropriate form and include it in the application packet.

Each applicant should forward his or her packet through appropriate channels, as described below:

1. If assigned to the ARNG, the applicant should forward the packet through the state chain of command to ARNG Operating Activity Center, ATTN: NGB-ARO-ME, Building E6814, Edgewood Area, Aberdeen Proving Ground, MD 21010-5420.

2. If assigned to a USAR Troop Program Unit (TPU) in the continental United States, the applicant should forward the packet through the chain of command of his or her Major United States Army Reserve Command to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200

3. If assigned to a USAR Control Group (IMA/Reinforcement) the applicant should send the packet to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

An application will not be considered unless it is received at the appropriate address not later than 15 December 1992.

Individuals selected to attend the course will be notified on or about 1 February 1993. An officer selected for attendance at the graduate course must be funded by the Army Reserve Personnel Center, the ARNG of his or her home state, or the Active Guard Reserve Management Directorate.

The Judge Advocate General's *Continuing Legal Education* (On-Site) Training

This note discloses the training sites, dates, subjects, and local action officers for The Judge Advocate General's Continuing Legal Education (On-Site) Training Program for academic year 1993. The Judge Advocate General has directed that all judge advocates assigned to USAR Judge Advocate General Service Organizations (JAGSOs) or to the judge advocate sections of USAR TPUs shall attend on-site training sessions conducted in their geographic areas.[1] Moreover, all other judge advocates—that is, judge advocates serving on active duty or in the USAR, National Guard, or other services—are strongly encouraged to attend local training sessions. The On-Site Training Program, which features instructors from The Judge Advocate General's School, has been approved for continuing legal education (CLE) credit in all states. Many on-site sessions also feature instruction by judge advocates of other services and distinguished civilian attorneys.

An action officer must coordinate with all local Reserve Component units to which judge advocates are assigned and must invite judge advocates on nearby active duty Army installations to attend on-site training. An action officer also must notify members of the Individual Ready Reserve (IRR) that on-site training will occur in their geographical areas.[2]

Whenever possible, an action officer will arrange to provide legal specialist and noncommissioned officer (NCO) training and court reporter training concurrently with on-site training. In the past, active duty and Reserve Component judge advocates and NCOs, as well as instructors from the Army legal clerk's school at Fort Jackson, have conducted enlisted training programs. A model training plan for enlisted soldier on-site instruction has been distributed to assist in planning and conducting this training.

Commanders of JAGSO detachments and the SJAs of Reserve Component TPUs must ensure that their unit training schedules reflect on-site training. Attendance may be slated as regularly scheduled training, as equivalent training, or on man-day spaces. On-site training takes priority over providing mutual support to active component military installations.

Questions concerning the On-Site Training Program should be directed to the appropriate local action officer. Any problem that an action officer or a unit commander cannot resolve should be directed to Major Mark Sposato, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, Office of The Judge Advocate General, Charlottesville, VA 22903-1781 (telephone (804) 972-6380).

---

[1] *See* DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, paras. 10-10, 11-11 (15 Sept. 1989).

[2] Limited funding from ARPERCEN may be available for an IRR member to attend on-site training in active duty for training (ADT) status. An IRR member should submit an application for ADT status eight to ten weeks before the scheduled on-site session to Commander, ARPERCEN, ATTN: DARP-OPS-JA (LTC Carazza), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR also may attend on-site training for retirement point credits. *See generally* DEP'T OF ARMY, REG. 140-185, ARMY RESERVE: TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS (15 Sept. 1979).

The Judge Advocate General's School
Continuing Legal Education (On-Site) Training for Academic Year 1993

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
17-18 Oct. 92	Minneapolis, MN 214th MLC Thunderbird Motor Hotel Bloomington, MN 55431	ACGO RC GO Crim Law Int'l Law GRA Rep	 BG Morrison MAJ O'Hare LCDR Rolph COL Curtis	LTC Randel I. Bichler 760 Seventh St. SW Wells, MN 56097 (507) 553-5021

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
24-25 Oct 92	Willow Grove, PA 79th ARCOM & 153d MLC Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Cullen MAJ Jennings LTC Leclair Dr. Foley	LTC Robert C. Gerhard 619 Curtis Rd. Glenside, PA 19038 (215) 885-6780
14-15 Nov 92	New York, NY 77th ARCOM & 4th MLC Fordham Law School New York, NY 10023	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Morrison/COL Lassart MAJ Hudson MAJ Tomanelli COL Curtis	LTC John Greene 437 73d St. Brooklyn, NY 11209 (212) 264-0656
20-22 Nov 92	San Antonio, TX 90th ARCOM Sheraton Fiesta Hotel San Antonio, TX 78216	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Lassart MAJ Comodeca LTC Jones LTC Hamilton	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209-1598 (512) 221-5164
8-10 Jan 93	Long Beach, CA 78th MLC Long Beach Marriott Long Beach, CA 90815	AC GO RC GO Crim Law Int'l Law GRA Rep	 BG Morrison MAJ Tate LCDR Rolph COL Curtis	MAJ John Tobin Chapman, Fuller & Bollard 2010 Main St. Suite 400 Irvine, CA 92714 (714) 752-1455
23-24 Jan 93	Fort Sheridan, IL 96th JAG Det.	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Lassart MAJ Myhre MAJ O'Hare MAJ Sposato	LTC Timothy Hyland Bldg. 82 Fort Sheridan, IL 60037 (708) 926-3821
30-31 Jan 93	Seattle, WA 6th MLC University of Washington Law School Seattle, WA 78205	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Cullen MAJ Warner LTC Dorsey MAJ Menk	MAJ Mark Reardon 6th MLC 4505 36th Ave. W. Seattle, WA 98199 (206) 281-3002
5-7 Feb 93	New Orleans, LA 2d MLC/LAARNG	AC GO RC GO Ad & Civ Law Ad & Civ Law GRA Rep	 COL Lassart MAJ McFetridge MAJ Pearson LTC Hamilton	LTC James J. Donelon HQ, STARC AGO Bldg., Rm. 212 Jackson Barracks New Orleans, LA 70146-0330 (504) 278-6228 DSN 485-6228
27-28 Feb 93	Salt Lake City, UT 87th MLC HQ, Utah National Guard 12953 S. Minuteman Drive Draper, Utah 84020	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Wilkins MAJ Connor MAJ Menk	MAJ Ernie Jones 87th MLC, Bldg. 100 Douglas AFRC Salt Lake City, UT (801) 363-7900

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
27-28 Feb 93	Denver, CO 120th JAG Det	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Morrison MAJ Wilkins MAJ Connor MAJ Sposato	LTC Patrick Buckingham 730 N. Weber Suite 101 Colorado Springs, CO 80903 (803) 733-2878
6-7 Mar 93	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Hunter MAJ Emswiler LTC Hamilton	MAJ Robert H. Uehling 209 South Springs Rd. Columbia, SC 29226 (803) 733-2878
13-14 Mar 93	Washington, D.C. 10th MLC NWC (Arnold Auditorium) Fort McNair Washington, D.C. 20319	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Lassart MAJ Johnson MAJ Melvin MAJ Sposato	CPT Jordan E. Tannenbaum 4122 Nomis Drive Fairfax, VA 22032 (703) 687-1023
29-21 Mar 93	Burlington, MA 94th ARCOM Days Inn Burlington, MA 01803	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Morrison MAJ Warner MAJ Killham Dr. Foley	COL Gerald D'Avolio SJA, HQ, 94th ARCOM ATTN: AFKA-ACC-JA AFRC, Bldg. 1607 Hanscom AFB, MA 01731 (617) 523-4860
27-28 Mar 93	Fort Wayne, IN 123d ARCOM Marriott Hotel Fort Wayne, IN 46818	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Lassart MAJ Peterson MAJ Burrell LTC Hamilton	MAJ Byron N. Miller 200 Tyne Rd. Louisville, KY 40207 (502) 587-3400
3-4 Apr 93	San Francisco, CA 5th MLC 6th Army Conference Rm, Bldg. 35 Presidio of San Francisco, CA 94129	AC GO RC GO Crim Law Int'l Law GRA Rep	 COL Cullen MAJ Borch MAJ Johnson COL Curtis	COL David Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030
17-18 Apr 93	Fort Lauderdale, FL 174th MLC	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Cullen MAJ Bowman MAJ Cameron Dr. Foley	MAJ John J. Copelan, Jr. Broward Co Attorney's Office 115 South Andrews Ave. Suite 423 Fort Lauderdale, FL 33301 (305) 57-7600
30 Apr-2 May 93	St. Louis, MO 102d ARCOM Sheraton West Port Plaza St. Louis, MO 63146	AC GO RC GO Int'l Law Int'l Law GRA Rep	 COL Lassart MAJ Hudson MAJ Johnson MAJ Sposato	MAJ Robert Mast 102d ARCOM ATTN: AFRC-AMO-JA 4301 Goodfellow Rd. St. Louis, MO 63120 (314) 263-3153/3319

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
15-16 May 93	Columbus, OH OH ARNG/83d ARCOM Defense Construction Supply Center	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Morrison CPT Jacobson MAJ Hancock MAJ Menk	LTC Thomas G. Schumacher 762 Woodview Drive Edgewood, KY (606) 341-2862
21-23 May 93	Gulf Shores, AL 121st ARCOM/ALARNG	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Cullen MAJ Hostetter MAJ Hudson MAJ Menk	MAJ Dana H. Wendt 121st ARCOM 255 W. Oxmoor Rd. Birmingham, AL 35209- 6383 (205) 940-9304

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1992

8-11 September: 1992 USAREUR Administrative Law CLE (5F-F24E).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

5-9 October: TJAG's Annual CLE Workshop (5F-JAG).

13-16 October: 1992 USAREUR Criminal Law CLE (5F-F35E).

13 October-18 December: 129th Basic Course (5-27-C20).

19-23 October: 114th Senior Officers' Legal Orientation (5F-F1).

26-30 October: 31st Legal Assistance Course (5F-F23).

26-30 October: 52d Law of War Workshop (5F-F42).

2-6 November: 10th Federal Litigation Course (5F-F29).

2-6 November: 29th Criminal Trial Advocacy Course (5F-F32).

16-20 November: 35th Fiscal Law Course (5F-F12).

30 November-1 December: 1st Basic Procurement Course (5F-F36).

30 November-4 December: 14th Operational Law Seminar (5F-F47).

7-11 December: 42d Federal Labor Relations Course (5F-F22).

1993

4-6 January: 1993 USAREUR Tax CLE (5F-F28E).

4-8 January: 115th Senior Officers' Legal Orientation (5F-F1).

6-9 January: 1993 USAREUR Legal Assistance CLE (5F-F23E).

11-15 January: 1993 Government Contract Law Symposium (5F-F11).

11-15 January: 1993 MACOM Tax CLE (5F-F28P).

19 January-26 March: 130th Basic Course (5-27-C20).

1-5 February: 30th Criminal Trial Advocacy Course (5F-F32).

1-5 February: 1993 USAREUR Contract Law CLE (5F-F15E).

8-12 February: 116th Senior Officers' Legal Orientation (5F-F1).

22 February-5 March: 130th Contract Attorneys' Course (5F-F10).

8-12 March: 32d Legal Assistance Course (5F-F23).

15-19 March: 53d Law of War Workshop (5F-F42).

22-26 March: 17th Administrative Law for Military Installations Course (5F-F24).

29 March-2 April: 5th Installation Contracting Course (5F-F18).

5-9 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).

12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

20-23 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys' Course (5F-F10).

17-21 May: 36th Fiscal Law Course (5F-F12).

17 May-4 June: 36th Military Judges' Course (5F-F33).

18-21 May: 1993 USAREUR Operational Law CLE (5F-F47E).

24-28 May: 43d Federal Labor Relations Course (5F-F22).

7-11 June: 118th Senior Officers' Legal Orientation (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JAOAC, Phase II (5F-F58).

14-25 June: JATT Team Training (5F-F57).

14-18 June: 4th Legal Administrators' Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys' Course (5F-F10).

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officers' Legal Orientation (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

November 1992

2-4: ESI, Just-in-Time and Systems Contracting, Washington, D.C.

2-6: GWU, Cost-Reimbursement Contracting, Washington, D.C.

3-6: ESI, Negotiation Strategies and Techniques, Washington, D.C.

5: ABICLE, Evidence, Dothan, AL.

5: ABICLE, Evidence, Sheffield, AL.

6: NYSBA, Update '92, New York, NY.

6: ABICLE, Criminal, Birmingham, AL.

6-7: LSU, 22nd Annual Estate Planning Seminar, Baton Rouge, LA.

9: ESI, Contract Accounting Systems for Small Businesses, Washington, D.C.

9: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

10-13: ESI, Small Purchases, Washington, D.C.

10-13: ESI, Specifications for ADP/T (FIP) Hardware and Software, Washington, D.C.

12: ABICLE, Damages, Birmingham, AL.

12: ABICLE, Basics of Bankruptcy, Birmingham, AL.

12-13: SLF, Patent Law Institute, Dallas, TX.

13: ABICLE, Bankruptcy, Birmingham, AL.

13: ABICLE, Damages, Montgomery, AL.

14-20: AAJE, Negligence Litigation, Los Angeles, CA.

15-17: NCJFC, Restorative Justice for Juvenile Sex Offenders, Reno, NV.

16-18: LRP, Workers' Compensation, Chicago, IL.

16-20: ESI, Federal Contracting Basics, Denver, CO.

16-20: GWU, Construction Contracting, Washington, D.C.

17-18: NYSBA, Basic Trial of a Civil Lawsuit, Various Locations, NY.

17-20: ESI, Strategic Purchasing, Washington, D.C.

17-20: ESI, Contract Accounting and Financial Management, Washington, D.C.

18-19: SLF, Planning, Zoning, & Eminent Domain Institute, Dallas, TX.

30-December 4: ESI, Operating Practices in Contract Administration, Vienna, VA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAJE: American Academy of Judicial Education, 1613 15th Street, Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

ABA: American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 W. Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

BNA: The Bureau of National Affairs, Inc., 1231 25th Street N.W., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CHBA: Chicago Bar Association, CLE, 29 S. LaSalle Street, Suite 1040, Chicago, IL 60603. (312) 782-7348.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744; (800) 521-8662.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

EEI: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street N.W., Suite 408, Washington, D.C. 20006-3697. (202) 638-0252.

FP: Federal Publications, 1120-20th Street N.W., Washington, D.C. 20036. (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885,, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 777 N. Capitol Street, N.E., Suite 405, Washington, D.C. 20002. (202) 408-0990.

GWU: Government Contracts Program, The George Washington University National Law Center, 2020 K Street N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

HICLE: Hawaii Institute for CLE, U.H. Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 E. Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

JMLS: John Marshall Law School, 315 S. Plymouth Court, Chicago, IL 60604. (312) 427-2737, ext. 573.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

LRP: LRP Publications, 421 King Street, P.O. Box 1905, Alexandria, VA 22313-1905. (703) 684-0510; (800) 727-1227.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MICPEL: Maryland Institute for Continuing Professional Education of Lawyers, Inc., 520 W. Fayette Street, Baltimore, MD 21201. (301) 328-6730.

MILE: Minnesota Institute of Legal Education, 25 S. Fifth Street, Minneapolis, MN 55402. (612) 339-MILE.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

NCCLE: National Center for Continuing Legal Education, Inc., 431 W. Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 S. 14th Street, P.O. Box 81809, Lincoln, NE 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NHLA: National Health Lawyers Association, 522 21st Street N.W., Suite 120, Washington, DC 20006. (202) 833-1100.

NIBL: Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; ((612) 644-0323 in MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street N.W., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NPI: National Practice Institute, 330 Second Avenue S., Suite 770, Minneapolis, NM 55401. (612) 338-1977, (800) 328-4444.

NWU: Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.

NYUSCE: New York University, School of Continuing Education, 11 W. 42d Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 110 W. 3d Street, Room 207, New York, NY 10012. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 1377, Columbus, OH 43216-1377. (614) 487-8585.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

SBA: State Bar of Arizona, 363 N. First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, P.O. Box 577, Helena, MT 59624-0577 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

STCL: South Texas College of Law, 1303 San Jacinto Street, Houston, TX 77002-7006. (713) 659-8040.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

USTA: United States Trademark Association, 6 E. 45th Street, New York, NY 10017. (212) 986-5880.

UTSL: University of Texas School of Law, 727 E. 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
*California	1 February annually
Colorado	Any time within three-year period
Delaware	31 July biennially
*Florida	Assigned month every three years
Georgia	31 January annually
Idaho	Every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
**Mississippi	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after completing each CLE program
**North Carolina	28 February annually
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter every three years
Pennsylvania	1 January annually
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July bienniall
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1992 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and are mailed only to those DTIC users whose organizations have facility clearances. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203	Government Contract Law Deskbook, vol. 1/JA-505-1-91 (332 pgs).
AD A239204	Government Contract Law Deskbook, vol. 2/JA-505-2-91 (276 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD A248421	Real Property Guide—Legal Assistance/ JA-261-92 (308 pgs).
AD B147096	Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).
AD B147389	Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).
AD A228272	Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).
AD A246325	Soldiers' and Sailors' Civil Relief Act/ JA-260(92) (156 pgs).
AD A244874	Legal Assistance Wills Guide/JA-262-91 (474 pgs).
AD A244032	Family Law Guide/JA 263-91 (711 pgs).
AD A241652	Office Administration Guide/JA 271-91 (222 pgs).
AD B156056	Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).
AD A241255	Model Tax Assistance Guide/JA 275-91 (66 pgs).
AD A246280	Consumer Law Guide/JA 265-92 (518 pgs).
AD A245381	Tax Information Series/JA 269/92 (264 pgs).

Administrative and Civil Law

AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
AD A240047	Defensive Federal Litigation/JA-200(91) (838 pgs).
AD A236663	Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).
AD A239554	Government Information Practices/ JA-235(91) (324 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

*AD A251120 Criminal Law, Nonjudicial Punishment/ JA-330(92) (40 pgs).

*AD A251717 Senior Officers' Legal Orientation/ JA 320(92) (249 pgs).

*AD A251821 Trial Counsel & Defense Counsel Handbook/ JA 310(92) (452 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Guard & Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam. 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and sup-porting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21[illegible]896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 27-26	Rules of Professional Conduct for Lawyers (S/S DA Pam. 27-26, Dec 87)	1 May 92
AR 37-104-10	Financial Administration, Interim Change I02	30 Apr 92
AR 210-3	Nonstandard Activities of the U.S. Military Academy and West Point Military Reservation, Interim Change I01 1 May 92	1 May 92
AR 420-46	Water Supply and Wastewater	1 May 92
AR 600-8-7	Retirement Services Program	17 Apr 92
AR 600-8-23	Standard Installation/Division Personnel System (SIDPERS) Database Management	1 Mar 92
AR 600-20	Army Command Policy, Interim Change I02	1 Apr 92
AR 621-202	Army Educational Incentives and Entitlements	3 Feb 92
CIR 11-87-1	Internal Control Review Checklist, Interim Change I01 1 Jun 92	1 Jun 92
JFTR	Joint Federal Travel Regulations, vol. 1, Uniformed Services, C66	1 Jun 92
DA Pam. 25-30	Index of Publications and Blank Forms, C2	1 Apr 92
	Pay Entitlements Manual, C26	31 Mar 92

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through

the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" *J*oin a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to *D*ownload a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for *X*-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to *A*bandon the conference. Then enter [g] for *G*ood-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to *D*ownload a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for *X*-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say *G*ood-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call

up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

c. *TJAGSA Publications Available Through the LAAWS BBS.*

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

FILE NAME	UPLOADED	DESCRIPTION
121CAC.ZIP	June 1990	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.Z IP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1991
505-2.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1991
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
ALAW.ZIP	June 1990	*The Army Lawyer* and *Military Law Review* Database (ENABLE 2.15). Updated through 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
JA200A.ZIP	March 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	March 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	March 1992	Law of Federal Employment
JA211.ZIP	March 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235.ZIP	March 1992	Government Information Practices
JA240PT1.ZIP	May 1990	Claims—Programmed Text, vol. 1
JA240PT2.ZIP	May 1990	Claims—Programmed Text, vol. 2
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	May 1990	Soldiers' and Sailors' Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA263A.ZIP	May 1990	Legal Assistance Family Law
JA265A.ZIP	May 1990	Legal Assistance Consumer Law Guide (1/3)
JA265B.ZIP	May 1990	Legal Assistance Consumer Law Guide (2/3)
JA265C.ZIP	May 1990	Legal Assistance Consumer Law Guide (3/3)
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA273.ZIP	March 1992	Legal Assistance Living Wills Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation

JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA296A.ZIP	May 1990	Administrative and Civil Law Handbook (1/6)
JA296B.ZIP	May 1990	Administrative and Civil Law Handbook (2/6)
JA296C.ZIP	May 1990	Administrative and Civil Law handbook (3/6)
JA296D.ZIP	May 1990	Administrative and Civil Law Handbook (4/6)
JA296F.ARC	April 1990	Administrative and Civil Law Handbook (6/6)
JA301.ZIP	October 1991	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	October 1991	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	October 1991	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	October 1991	Nonjudicial Punishment —Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	October 1991	Crimes and Defenses Handbook (**DOWNLOAD ON HARD DRIVE ONLY.**)
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared excess and is available for redistribution. Please contact the installations directly for transfer.

1. Commander, Chemical Materiel Law Office, U.S. Army Chemical Research, Development, & Engineering Center, ATTN: Cheryl S. Fields, Edgewood Arsenal, Aberdeen Proving Ground, MD 21010; Telephone: DSN: 584-2289; Commercial: (410) 278-1288/2289.

Decisions of the Comptroller General of the United States:

DATE	VOLUME	PAGES	COPIES AVAILABLE
1990	69		
Apr.		359-432	2

DATE	VOLUME	PAGES	COPIES AVAILABLE
July		549-641	2
Aug.		643-690	1
Sept.		691-758	1
Oct.	70	1-52	2
Nov.		53-113	1
Dec.		115-164	2
1991	70		
Jan.		165-224	2
Feb.		225-312	2
Mar.		313-389	2
Apr.		389-458	2
May		459-539	2
Jun.		541-605	2
Jul.		607-660	1
Aug.		661-698	2
Sept.		699-737	2
Oct.	71	1-54	2
Nov.		55-96	2

2. Judge Advocate Liaison, Headquarters, U.S. Army Garrison, Fort Indiantown Gap, ATTN: AFKA-ZQ-JA (SSG Dalton), Annville, PA 17003-5011; Telephone: DSN: 277-2802; Commercial: (717) 865-5444, ext. 2294.

Court-Martial Reports
Military Justice Digest, vols. 1-33
Purdon's Pennsylvania Statutes Annotated
U.S. Code Congressional & Administrative News
Federal Rules of Evidence, 3d ed.
Federal Rules of Evidence, 1985 Supp.
Military Rules of Evidence Manual
Military Rules of Evidence Manual, 2d ed.
Government Contracts Reporter, vols. 1-8
Family Estate Planning Guide, 2d ed.

3. Headquarters, Fifth U.S. Army, ATTN: AFKB-JA (SGM Francis Black), Fort Sam Houston, TX 78234-7000; Telephone: DSN 471-1514, Commercial: (512) 221-1515.

Bouvier's Law Dictionary (2 copies)
Corpus Juris Secundum/American Law Books (156 vols.)
Court-Martial Reports (52 vols.)
Decisions of the Comptroller General of the United States (7 vols.)
National Highway Carriers Directory (3 copies)
Shepard's Southwestern Reporter Citations (6 vols.)
Shepard's Texas Citations (4 vols.)
Texas Digest (65 vols.)
Texas Edition: Southwestern Reporter, 2d Series (82 vols.)
Texas Juris (10 vols.)
Texas Jurisprudence (77 vols.)
U.S. Law Week (31 vols.)
U.S. Code of Congressional Services (10 vols.)
U.S. Code Congressional & Administrative News (paper bound)
U.S. Court of Military Appeals Reports (22 vols.)

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the Secretary of the Army
02387

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

*U.S. Government Printing Office: 1992 — 311-810/60005

PIN: 070400-000